DOCKET

No. 08-1034

Title:	CSX Transportation, Inc., Petitioner
	v.
	Thurston Hensley
Docketed:	February 13, 2009
Lower Ct:	Court of Appeals of Tennessee, Eastern Division
Case Nos.:	(E2007-00323-COA-R3-CV)
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Rehearing Denied:	April 3, 2008
Discretionary Court Decision Date:	November 17, 2008

Date	Proceedings and Orders
Feb 13 2009	Petition for a writ of certiorari filed. (Response due March 16, 2009)
Mar 16 2009	Motion for leave to file amici brief filed by American Tort Reform Association, et al.filed. .
Mar 16 2009	Brief of respondent Thurston Hensley in opposition filed.
Mar 16 2009	Motion for leave to file amicus brief filed by Washington Legal Foundation filed..
Mar 16 2009	Motion for leave to file amicus brief filed by Association of American Railroads filed..
Mar 24 2009	Opposition of respondent to motion of American Tort Reform Association, et al. for leave to file brief amici curiae filed.
Mar 24 2009	Opposition of respondent to motion of Washington Legal Foundation for leave to file brief amicus curiae filed.
Mar 24 2009	Opposition of respondent to motion of Association of American Railroads for leave to file brief amicus curiae filed.
Mar 31 2009	Reply of petitioner CSX Transportation, Inc. filed.
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Apr 17 2009	Record Requested .
May 4 2009	Record received from Court of Appeals State of Tennesse (4 boxes).
May 18 2009	DISTRIBUTED for Conference of May 21, 2009.
May 26 2009	DISTRIBUTED for Conference of May 28, 2009.
Jun 1 2009	Motion for leave to file amicus brief filed by Association of American Railroads GRANTED.
Jun 1 2009	Motion for leave to file amicus brief filed by Washington Legal Foundation GRANTED.
Jun 1 2009	Motion for leave to file amici brief filed by American Tort Reform Association, et al. GRANTED.
Jun 1 2009	Petition GRANTED. Judgment REVERSED and case REMANDED. Justice Stevens dissents. Justice Ginsburg dissents. Opinion per curiam. (Detached Opinion)
Jul 6 2009	MANDATE ISSUED.

Name	Address	Phone
Attorneys for Petitioner:		
Dan Himmelfarb	Mayer Brown LLP	(202) 263-3000

1909 K Street, N. W.
Washington, DC 20006-1101
dhimmelfarb@mayerbrown.com

Party name: CSX Transportation, Inc.

Attorneys for Respondent:

Harry Douglas Nichol
Counsel of Record
Nichol & Associates
6759 Baum Drive
Knoxville, TN 37919
(865) 588-7465

Party name: Thurston Hensley

Other:

Mark A. Behrens
Shook Hardy & Bacon LLP
600 14th Street, NW
Suite 800
Washington, DC 20005
(202) 783-8400

Party name: American Tort Reform Association, et al.

Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Party name: Washington Legal Foundation

Daniel Saphire
Association of American Railroads
50 F Street, N.W.
Washington, DC 20001
(202) 639-2505

Party name: Association of American Railroads

PETITION FOR WRIT OF CERTIORARI

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No.

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

THURSTON HENSLEY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

PETITION FOR A WRIT OF CERTIORARI

GARETH S. ADEN
CHRISTOPHER W. CARDWELL
Gullett, Sanford, Robinson & Martin, PLLC
315 Deaderick Street
Nashville, TN 37219
(615) 244-4994

EVAN M. TAGER
DAN HIMMELFARB
Counsel of Record
STEPHEN E. SACHS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner
[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RANDALL A. JORDAN
GRANT BUCKLEY
KAREN JENKINS YOUNG
CHRISTOPHER R. JORDAN
The Jordan Firm
1804 Frederica Road
St. Simons Island, GA
31522
(912) 638-0505

H. DEAN CLEMENTS
Spears, Moore, Rebman
& Williams
801 Broad Street
Chatanooga, TN 37402
(423) 756-7000

QUESTION PRESENTED

In *Norfolk & Western Railway Co.* v. *Ayers*, 538 U.S. 135 (2003), this Court held that, under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, a plaintiff may "seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages," with the "important" qualification that the plaintiff must "prove that his alleged fear is genuine and serious." 538 U.S. at 157. The Court also identified a number of "verdict control devices," including, "on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious." *Id.* at 159 n.19. The question presented is whether the Tennessee Court of Appeals erred in holding that a defendant is *not* entitled to a jury instruction that the plaintiff must prove his alleged fear of cancer to be "genuine and serious."

RULE 29.6 STATEMENT

Petitioner CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10 percent of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CSX Transportation, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Tennessee in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Tennessee and its opinion and order on petition for rehearing (App., *infra*, 1a-44a) are not yet reported in the *South Western Reporter*, but they are available at 2008 WL 683755. The memorandum opinion and order of the trial court denying petitioner's motion for a new trial and/or to alter or amend the judgment (App., *infra*, 46a-54a) is unreported.

JURISDICTION

The judgment of the Court of Appeals of Tennessee was entered on March 14, 2008, and its order denying rehearing was entered on April 3, 2008. Petitioner filed a timely application for permission to appeal in the Supreme Court of Tennessee, which denied the application on November 17, 2008 (App., *infra*, 45a). The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Section 1 of the Federal Employers' Liability Act, 45 U.S.C. § 51, is reproduced in the appendix. App., *infra*, 72a-73a.

STATEMENT

Under the Federal Employers' Liability Act (FELA or Act), 45 U.S.C. §§ 51-60, railroad employees may recover for workplace injuries caused in whole or in part by the railroad's negligence. In *Nor-*

folk & Western Railway Co. v. *Ayers*, 538 U.S. 135 (2003), this Court held that a FELA plaintiff suffering from asbestosis may recover for "fear of cancer" as an element of his damages for pain and suffering, subject to the "important" limitation that the plaintiff must prove the fear to be "genuine and serious." *Id.* at 157. To prevent improper recoveries from "bankrupt[ing] defendants," the Court identified a number of "verdict control devices," including, "on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious." *Id.* at 159 n.19.

Respondent sued petitioner under FELA, alleging that it had negligently caused his asbestosis and seeking damages for (among other things) a fear of developing cancer in the future. Petitioner requested the jury instruction identified in *Ayers*—that respondent must prove his fear to be "genuine and serious"—but the trial court refused to give it. The jury ultimately returned a verdict for respondent, awarding damages of $5,000,000.

The Tennessee Court of Appeals upheld the trial court's refusal to give a "genuine and serious fear" instruction. The court of appeals believed that the instruction was not required by *Ayers*—and, indeed, that such a charge would make "little sense" and serve "little if any purpose," because a "juror who might be predisposed to grant a large award based on shaky evidence of a fear of cancer is unlikely to be swayed by the language of *Ayers*." App., *infra*, 34a. The court thought it was enough for a trial court to conduct sufficiency-of-the-evidence review to determine whether the jury "*could* * * * f[i]nd" that the fear was "genuine and serious"—even though the jury itself would not be told that it *must* so find to

award damages for a fear of cancer. *Id.* at 36a (emphasis added). The Supreme Court of Tennessee denied review. *Id.* at 45a.

The decision below, which holds that a defendant has no right to a "genuine and serious fear" instruction, is flatly inconsistent with *Ayers*, which makes clear that a defendant *does* have that right. Indeed, this very case—in which there was only the thinnest evidence of a "genuine and serious" fear, only a vague instruction on "pain and suffering," improper and inflammatory argument by respondent's counsel, and a staggeringly large damages award—is a textbook example of precisely *why* a defendant is entitled to a "genuine and serious fear" instruction. This Court should therefore grant certiorari, and either set the case for plenary review or summarily reverse. Further review is necessary to confirm that this Court meant what it said in *Ayers*; to disapprove the bizarre and severely flawed reasoning of the court of appeals; to ensure that an "important" "verdict control device[]" (*Ayers*, 538 U.S. at 157, 159 n.19) is uniformly available to minimize the risk of "unlimited and unpredictable liability" in asbestos cases (*Metro-North Commuter R.R. Co.* v. *Buckley*, 521 U.S. 424, 433 (1997)); and to disallow a massive and fundamentally unfair verdict by a misinstructed jury.

A. Legal Framework

1. Enacted in 1908, FELA provides a compensation scheme for injuries sustained by railroad employees in the workplace. The Act provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Norfolk S. Ry. Co.* v. *Sorrell*, 549 U.S. 158, 165 (2007). State-law remedies are preempted. *Ibid.*

Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA requires an injured railroad employee to prove negligence. Section 1 of FELA provides that

> [e]very common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

45 U.S.C. § 51.

2. In *Ayers*, this Court addressed whether FELA authorizes recovery for "fear of cancer." The specific question was "[w]hether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer under the [FELA] without proof of physical manifestations of the claimed emotional distress." *Ayers*, 538 U.S. at 157. The Court answered that question "yes," but "with an important reservation." *Ibid.* Although a railroad employee may "seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages," the Court held, "[i]t is incumbent" upon such a plaintiff to prove that his alleged fear is "genuine and serious." *Ibid.*

Four Justices dissented. Three would have held that damages for fear of cancer are never recoverable as an element of pain and suffering caused by asbestosis. *Ayers*, 538 U.S. at 166-181 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor and Breyer, JJ., dissenting in relevant part). The fourth would have adopted a stricter standard for recovery, and would have held that the standard was not satisfied in that

case. *Id.* at 182-187 (Breyer, J., dissenting in relevant part). Both dissenting opinions pointed out that bankruptcies caused by asbestos litigation had reduced the funds available to pay judgments, and both expressed concern that, by authorizing recovery by plaintiffs who merely *fear* cancer, the Court's decision would further diminish the funds available to those who have actually *contracted* the disease. *Id.* at 167-170 (Kennedy, J., dissenting); *id.* at 185-187 (Breyer, J., dissenting).

In response to that concern, the Court emphasized the "verdict control devices" in fear-of-cancer cases. *Ayers*, 538 U.S. 159 n.19. The Court specifically identified three such "control measures": review of the damages award for sufficiency of the evidence; particularized verdict forms; and, "on a defendant's request, a charge that each plaintiff must prove any alleged fear [of cancer] to be genuine and serious." *Ibid.*

B. Proceedings In The Trial Court

1. Respondent worked for petitioner's predecessor, L&N Railroad, and then for petitioner. In 2002, he filed suit against petitioner under FELA in the Circuit Court of Hamilton County, Tennessee. Respondent alleged that, during the course of his employment, he had been negligently exposed both to a chlorinated solvent, which caused him to develop toxic encephalopathy (a neurological disorder), and to asbestos, which caused him to develop asbestosis (a lung disease). Respondent sought to recover damages for, among other things, his alleged fear of developing cancer in the future as a result of his exposure to asbestos. Petitioner denied respondent's allegations, and the case proceeded to trial. Resp. Am.

Compl. 1-8; Pet. Answer to Am. Compl. 1-4; Pet. C.A. Br. 2; App., *infra*, 2a-3a.

2. As far as his alleged fear of cancer was concerned, respondent's trial evidence consisted almost entirely of his own testimony. On that issue, he testified as follows:

> Q: * * * [Y]ou have never been told by any physician that you have cancer? No doctor has told you that?
>
> A: Not staying [sic] I have cancer. They said I'm a likely prospect for it.
>
> Q: And you have some concern about that?
>
> A: Yes.
>
> Q: All right. It's not something that depresses you?
>
> A: It's in the back of my mind.
>
> Q: And I think you've described it as, "a little cloud," that's behind you?
>
> A: Uh-huh.
>
> Q: Is that true?
>
> A: Back in [sic] my mind. Same thing.
>
> Q: Yes, sir. Did you say that I don't make depressing [sic] or something like that[?] It's just a little cloud behind you; is that true?
>
> A: That's what I said here. It was back in [sic] my mind.

Trial Tr. 1462-1463.

Respondent also testified that he experienced anxiety, that he took medication for it, and that the

anxiety arose from his fear of contracting cancer. Trial Tr. 1369. Respondent admitted, however, that he had begun taking anxiety medication *before* he was diagnosed with asbestosis and *before* he was told by the diagnosing physician that his exposure to asbestos increased his risk of cancer. *Id.* at 1464-1465. Another physician confirmed that he had first prescribed anxiety medication for respondent before he was diagnosed with asbestosis—and, indeed, before he was diagnosed with toxic encephalopathy. *Id.* at 1245. That physician also testified that the cause of respondent's anxiety had never been apparent. *Id.* at 1255, 1305.

3. Pursuant to *Ayers*, petitioner moved for a directed verdict on respondent's fear-of-cancer claim, arguing that there was insufficient evidence that his alleged fear was "genuine and serious." Trial Tr. 1475, 1482-1488. The trial court denied the motion. *Id.* at 2719-2720.

Also pursuant to *Ayers*, petitioner asked the trial court to instruct the jury that it could not award damages for respondent's alleged fear of cancer unless it found that the fear was "genuine and serious." One of petitioner's requested instructions on that issue (No. 30) read as follows:

> Plaintiff is also alleging that he suffers from a compensable fear of cancer. In order to recover, Plaintiff must demonstrate first, that he has a reasonable fear of cancer; second, that reasonable fear stems from Plaintiff's asbestos-related disease; and third, that the reasonable fear is genuine and serious. Plaintiff must prove each of these elements by a preponderance of the evidence.

App., *infra*, 70a.[1] The trial court refused to give the proposed instructions. *Id.* at 63a-69a.

4. In his summation, respondent's counsel misstated the legal standard governing recovery for fear of cancer. At one point, he suggested that the jury could award damages for a "real and genuine fear," omitting the requirement that the fear also be "serious." Trial Tr. 2782. At another point, he omitted the requirement of "fear" altogether, suggesting that the jury could award damages for an "increased *risk* of cancer." *Id.* at 2799 (emphasis added); see *Ayers*, 538 U.S. at 153 (distinguishing been compensable "fear" of cancer and non-compensable "risk" of cancer).

Respondent's counsel also appealed repeatedly to the jurors' passions and asked them to punish petitioner for its conduct. He did this despite pre-trial rulings prohibiting counsel from asking the jury to "send a message" or alluding to similar suits by other railroad employees (see Motions Tr. 33, 39, 115), and despite the unavailability of punitive damages in

---

[1] Another of petitioner's requested instructions (No. 33) would have apprised the jury of some of the considerations that bear on whether a fear of cancer is "genuine and serious"—in particular,

> whether or not the Plaintiff has voiced more than a general concern about his future health, whether or not he has suffered from insomnia or other stress-related conditions, whether or not he has sought psychiatric or medical attention for his symptoms, whether he has consulted counselors or ministers concerning his fear, whether he has demonstrated any physical symptoms as a result of his fear, and whether he has produced witnesses who can corroborate his fear.

App., *infra*, 71a.

FELA cases (see, *e.g.*, *Miller* v. *Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993)). Among other things, counsel argued that petitioner had "refused to take responsibility for ruining [respondent's] life," had engaged in "outrageous" and "medically unethical" conduct, had "broke[n] * * * the law," and was willing to "spend any amount of money to convince you [that] the truth is not the truth." Trial Tr. 2791, 2795-2796, 2802-2803. Counsel also claimed that other railroad workers had suffered and died from the same "human tragedy" inflicted on respondent, and asked for a damages award calculated by multiplying defense-witness fees. *Id.* at 2773, 2802.

On the basis of these and other inflammatory statements in counsel's summation, petitioner moved for a mistrial, but the trial court denied the motion. Trial Tr. 2806-2807.

5. In its instructions to the jury, the trial court did not mention respondent's fear-of-cancer claim in general or *Ayers*' "genuine and serious" limitation in particular. Instead, the court delivered the following very general instruction on pain and suffering:

> Mr. Hensley would be entitled to recover separately for any pain and suffering. Pain and suffering is simply what it means. This amount compensates Mr. Hensley for any physical suffering and emotional suffering which he has sustained.

App., *infra*, 61a-62a. Petitioner objected to the court's failure to give a "genuine and serious fear" instruction. *Id.* at 62a.

6. The jury returned a verdict for respondent. It found that petitioner was negligent and that its negligence was a cause, in whole or in part, of respon-

dent's asbestosis and toxic encephalopathy; it found that respondent was not contributorily negligent; and it awarded $5,000,000 in damages. App., *infra*, 55a-59a.

Petitioner filed a motion for a new trial and/or to alter or amend the judgment. Among other things, it argued that the trial court had erred in refusing to direct a verdict on respondent's fear-of-cancer claim and in refusing to instruct the jury on the elements of that claim. Mem. Supp. Mot. New Trial and/or Alter or Amend J. 14-19. The trial court denied the motion in its entirety. App., *infra*, 46a-54a.

C. Decision Below

1. Petitioner appealed. It raised several issues for review, including two relating to respondent's fear-of-cancer claim. First, petitioner argued that there was insufficient evidence that respondent's fear was "genuine and serious," and that the trial court should therefore have directed a verdict on the claim. Pet. C.A. Br. 37-48. Second, petitioner argued that the trial court committed reversible error by refusing to instruct the jury that it could award fear-of-cancer damages only if it found that the fear was "genuine and serious." *Id.* at 48-51. The Court of Appeals of Tennessee rejected all of petitioner's claims and affirmed in a published opinion. App., *infra*, 1a-37a.

In upholding the trial court's refusal to give a "genuine and serious fear" instruction, the court of appeals followed the decision of the Missouri Court of Appeals in *Hedgecorth* v. *Union Pacific Railroad Co.*, 210 S.W.3d 220 (Mo. Ct. App. E.D. 2006), cert. denied, 128 S. Ct. 59 (2007). App., *infra*, 33a-34a. Quoting *Hedgecorth*, the court expressed the view

that *Ayers* "did not discuss or authorize jury instructions on this issue" and "does not require . . . instructions detailing or explaining damages based on a fear of developing cancer." *Ibid.* (quoting 210 S.W.3d at 228-229). Having so understood this Court's decision, the court of appeals declined to adopt "a requirement that the *Ayers* test or a similar standard be communicated to the jury." *Id.* at 34a.

The court also thought that "such a requirement would make little sense." App., *infra*, 34a. One purpose of the "genuine and serious" limitation, the court explained, "is to protect defendants from excessive verdicts based on appeals to jurors' passions with respect to the deeply emotional issue of cancer." *Ibid.* Because "the mere suggestion of a possibility of cancer has the potential to evoke raw emotions," the court said, "a juror may be swayed by the barest shred of evidence that a defendant has caused a plaintiff to suffer an increased * * * fear of cancer, and may be tempted to overcompensate the plaintiff for such a * * * fear." *Ibid.* "In light of this reality," the court believed that "little if any purpose would be served by instructing the jury that the plaintiff's fear must be 'genuine and serious,'" because "[a]ny juror who might be predisposed to grant a large award based on shaky evidence of a fear of cancer is unlikely to be swayed by the language of *Ayers*." *Ibid.* Rather than instructing juries that damages may be awarded only if the fear is "genuine and serious," the court reasoned, courts must "serve as gatekeepers * * * to ensure that fear of cancer claims do not *go* to the jury unless there is credible evidence of a 'genuine and serious' fear." *Ibid.*

The court of appeals then held that respondent had "introduced sufficient evidence" to "prove that he

had a genuine and serious fear of cancer," and thus to "support a fear of cancer claim under *Ayers*." App., *infra*, 34a-35a. In so holding, the court relied on respondent's testimony that (1) he had "some concern" that he might get cancer "in the back of [his] mind," like "a little cloud" hanging over him; (2) he had experienced "anxiety"; and (3) he had taken medication for his anxiety "in part because of his fear of cancer." *Id.* at 35a. The court acknowledged contrary evidence, including (1) respondent's admission that he had begun taking the anxiety medication *before* being diagnosed with asbestosis and (2) testimony of the prescribing physician that he did not know the cause of respondent's anxiety. *Id.* at 35a-36a. But the court determined that "it is the province of the jury to weigh [respondent's] evidence against the countervailing evidence," and that, "if the jury reasonably believed [respondent's] evidence, it could have found that a genuine and serious fear of cancer existed." *Id.* at 36a.[2]

2. Petitioner filed an application for permission to appeal in the Supreme Court of Tennessee. The application presented a number of issues for review, one of which was that the trial court had committed reversible error by refusing to give a "genuine and serious fear" instruction. App. for Permission to Appeal 15-31. The Supreme Court of Tennessee denied the application without explanation. App., *infra*, 45a.

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[2] In a subsequent opinion and order, the court of appeals denied petitioner's petition for rehearing on a claim (relating to a statute-of-limitations defense) that is not at issue here. App., *infra*, 37a-44a.

REASONS FOR GRANTING THE PETITION

The court below acknowledged that, under this Court's decision in *Ayers*, a FELA plaintiff seeking damages for fear of cancer must prove that the alleged fear is "genuine and serious." It also acknowledged that the question whether the fear is "genuine and serious" is for the jury to decide. The court nevertheless held that a defendant has no right to have the jury *informed* of this "important" limitation on recovery. *Ayers*, 538 U.S. at 157.

The court's decision squarely conflicts with *Ayers*, which makes clear that a FELA defendant *does* have the right to such an instruction. The reasoning employed by the court in support of its contrary conclusion is severely flawed. The question the court erroneously decided is a recurring one of exceptional importance. And this case is an ideal vehicle for confirming that this Court meant what it said in *Ayers*. For these reasons, the Court should grant certiorari and set the case for briefing on the merits and oral argument. In the alternative, because the decision below is so manifestly inconsistent with *Ayers*, the Court should grant certiorari and summarily reverse.

A. The Decision Below Squarely Conflicts With *Ayers*

One of the "compelling reasons" for the exercise of this Court's certiorari jurisdiction is that a state court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). This is one of the rare cases in which there is such a "direct" and "readily apparent" conflict. E. Gressman et al., SUPREME COURT PRACTICE § 4.5, at 250 (9th ed. 2007). The

court of appeals' decision is squarely "contrary to" *Ayers* (*United States* v. *Bass*, 536 U.S. 862, 864 (2002) (per curiam summary reversal)), a decision of this Court that "rejected the position taken by the [court of appeals] below" (*Spears* v. *United States*, No. 08-5721, 2009 WL 129044, at *2 (U.S. Jan. 21, 2009) (per curiam summary reversal)).

Ayers holds that a railroad employee may seek compensation for fear of cancer "as an element of his asbestosis-related pain-and-suffering damages" if, and only if, he "prove[s] that his alleged fear is genuine and serious." 538 U.S. at 157. The decision holds, in other words, that the "genuine[ness] and serious[ness]" of the alleged fear is an essential element of a fear-of-cancer claim. As with any other element of a FELA claim, that element must be proved to, and found by, the jury. See, *e.g.*, *Smith* v. *A.C. & S., Inc.*, 843 F.2d 854, 858 (5th Cir. 1988), cited in *Ayers*, 538 U.S. at 157-158. See generally *Baker* v. *Tex. & Pac. Ry. Co.*, 359 U.S. 227, 228 (1959) (per curiam). Indeed, the court below recognized that "it is the province of the jury" to decide whether an alleged fear of cancer is "genuine and serious." App., *infra*, 36a. A jury cannot make that—or any other—required finding, however, unless it is told that it must. That is why juries are instructed on the elements of a plaintiff's claim, both as to liability and as to damages. See, *e.g.*, *Carey* v. *Piphus*, 435 U.S. 247, 264 n.20 (1978) ("[j]uries must be guided by appropriate instructions" on "mental suffering or emotional anguish"); *St. Louis Sw. Ry. Co.* v. *Dickerson*, 470 U.S. 409, 411 (1985) (per curiam) (a FELA defendant is "entitled to a jury instruction on present value").

But *Ayers* does not merely hold *by implication* that a FELA defendant has a right to a "genuine and serious fear" instruction; it says so explicitly. Consistent with its more general holding that a plaintiff must prove the "genuine and serious" nature of his alleged fear of cancer, *Ayers* specifically entitles a defendant, "on [its] request," to "a *charge* that each plaintiff must prove any alleged fear to be genuine and serious." 538 U.S. at 159 n.19 (emphasis added). Petitioner requested just such a charge here; the trial court nevertheless refused to give it; and the court of appeals upheld that refusal. Indeed, insofar as it believed that instructing the jury on this element would make "little sense" and serve "little if any purpose" (App., *infra*, 34a), the court seems to have held, not merely that a jury *need* not be so instructed, but that it *should* not be. The decision below is thus patently inconsistent with *Ayers*.

The court of appeals' decision also conflicts with decisions of this Court that emphasize the importance of focused instructions as a "verdict control device[]" (*Ayers*, 538 U.S. at 159 n.19) in other contexts in which juries commonly make large awards for an impermissible reason. In the analogous context of punitive damages, for example, the Court has made clear that "proper jury instruction[s]" are "a well-established and, of course, important check against excessive awards." *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415, 433 (1994). "Vague instructions" on punitive damages "do little to aid the decisionmaker in its task of assigning appropriate weight to [the] evidence" (*State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003)), and thus "a court, upon request, must protect against [a significant] risk" that the jury will misunderstand the law (*Philip Morris USA* v. *Williams*, 549 U.S. 346, 357

(2007)). "Careful instructions" provide a critical "safeguard[]" against the possibility that "arbitrariness, passion, or bias" will be "the basis for the jury's verdict." *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 474-475 (1993) (O'Connor, J., dissenting). Accordingly, as in *Ayers*, the Court has mandated certain instructions in punitive-damages cases. See, *e.g.*, *State Farm*, 538 U.S. at 422 ("A jury must be instructed * * * that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."); *Philip Morris*, 549 U.S. at 357 ("a court, upon request, must protect against [the] risk" that a jury will seek to punish the defendant for harm to non-parties).

B. The Reasoning Employed By The Court Below Is Severely Flawed

The court of appeals not only reached a conclusion at odds with an unambiguous requirement of *Ayers*; it sought to justify that conclusion with reasoning that cannot withstand the barest scrutiny. Indeed, the court's reasoning is fundamentally flawed in at least four independent respects.

First, the court overlooked critical language in *Ayers*. It mistakenly believed that this Court's decision "does not require . . . instructions detailing or explaining damages based on a fear of developing cancer," and that the decision "d[oes] not discuss or authorize jury instructions" that the alleged fear of cancer must be "genuine and serious." App., *infra*, 33a-34a (quoting *Hedgecorth*, 210 S.W.3d at 228-229). As we have explained, *Ayers* in fact makes clear, that, "on * * * request," a defendant is entitled to "a charge that each plaintiff must prove any al-

leged fear to be genuine and serious." 548 U.S. at 159 n.19.

Second, the court's decision is internally inconsistent. On the one hand, in addressing petitioner's challenge to the sufficiency of the evidence, the decision correctly recognized that whether the plaintiff has a "genuine and serious" fear of cancer is "the province of the jury," and that there must be sufficient evidence that "the jury * * * could have found that a genuine and serious fear of cancer existed." App., *infra*, 36a. On the other hand, in addressing petitioner's challenge to the trial court's refusal to give its proposed instruction, the court held that there is no "requirement that the *Ayers* test * * * be communicated to the jury." *Id.* at 34a.

But how can a jury find a fact unless it is told that it must? It defies logic to review a verdict to determine whether there was sufficient evidence to support a finding that the jury was never asked to make. And it is meaningless to say that a reviewing court may not "substitute [its] judgment for that of the jury" on whether "a genuine and serious fear of cancer existed" (App., *infra*, 36a) when the jury is not instructed to exercise its judgment on that issue in the first place.

Third, although the court correctly recognized that "the 'genuine and serious' requirement * * * protect[s] defendants from excessive verdicts based on appeals to jurors' passions with respect to the deeply emotional issue of cancer" (App., *infra*, 34a), it drew the wrong conclusion from that fact. Indeed, it drew precisely the opposite conclusion of the one it should have drawn.

The court thought that "little if any purpose would be served by instructing the jury that the plaintiff's fear must be 'genuine and serious,'" because, according to the court's bizarre logic, "[a]ny juror who might be predisposed to grant a large award based on shaky evidence of a fear of cancer is unlikely to be swayed by the language of *Ayers*." *Ibid.* But "[a] jury is presumed to *follow* its instructions," not ignore them. *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000) (emphasis added). That is why jury instructions are given. And a concern that jurors may return a verdict based on its passions rather than the law and the facts makes an instruction all the *more* necessary, not less.

Fourth, the court mistakenly believed that review for sufficiency of the evidence is an adequate substitute for a properly instructed jury. As with any element of the plaintiff's claim, it is certainly necessary, as the decision below observed, for courts to "serve as gatekeepers * * * to ensure that fear of cancer claims do not *go* to the jury unless there is credible evidence of a 'genuine and serious' fear." App., *infra*, 34a. But a court's gatekeeping is just as certainly not *sufficient*. That is why this Court included both sufficiency-of-the-evidence review *and* a jury instruction among the "verdict control devices" identified in *Ayers*. 538 U.S. at 159 n.19.

That there is legally sufficient evidence for a finding in the plaintiff's favor does not mean that the plaintiff is *entitled* to such a finding; it means only that the plaintiff is entitled to have the jury *make* the finding. A properly instructed jury could find, as a fact, that the plaintiff's fear of cancer is *not* "genuine and serious" even when there is legally sufficient evidence for the jury to come out the other way. In

this very case, the court of appeals held that there was sufficient evidence to support the damages award because there was "evidence" that respondent's fear of cancer was "genuine and serious," even though there was also "countervailing evidence" that it was not, such that a reasonable jury exercising its function of "weigh[ing] th[e] evidence" could also have found that any fear of cancer was *not* "genuine and serious." App., *infra*, 36a. But the jury was never given that option.

Under the court's peculiar reasoning, *no one* decides the issue that is necessary for an award of damages: whether the plaintiff's fear of cancer is *in fact* "genuine and serious." The jury does not make that decision at all (because it is not asked to); and the court decides only whether a reasonable jury *could* make the decision. That is quite clearly insufficient under *Ayers*.

C. The Question Presented Is A Recurring One Of Exceptional Importance

The decision below does not merely conflict squarely with *Ayers*, and it does not merely employ indefensible reasoning; the issue it erroneously decided is one of far-reaching importance. The court of appeals eliminated a critical mechanism for limiting recoveries in asbestos cases; the need for that mechanism is at least as compelling today as it was when *Ayers* was decided; there are hundreds, if not thousands, of pending cases in which the instructional issue could arise; and without this Court's intervention, defendants will continue to have a right to the instruction in some jurisdictions but not in others.

1. In *Ayers*, this Court described the plaintiff's obligation to prove that his "alleged fear is genuine

and serious" as an "important" limitation on recovery for fear of cancer under FELA. 538 U.S. at 157. By holding that jurors need not be informed of the limitation, the decision below severely dilutes it.

Ayers was a 5-4 decision, with two dissenting opinions. Quoting the Court's decision in a prior FELA case, both dissents expressed concern that the decision in *Ayers* would lead to "unlimited and unpredictable liability." 538 U.S. at 181 (Kennedy, J., dissenting in relevant part) (quoting *Metro-North*, 521 U.S. at 433); *id.* at 185 (Breyer, J., dissenting in relevant part) (same). The dissents also expressed concern that the decision would hasten the exhaustion of funds that would otherwise be available to those who actually *develop* cancer, as opposed to those who merely *fear* it. *Id.* at 167-170 (Kennedy, J., dissenting); *id.* at 185-187 (Breyer, J., dissenting).

As the dissents pointed out, the costs of asbestos litigation—already more than $50 billion when *Ayers* was decided—have "driven dozens of companies into bankruptcy." *Ayers*, 538 U.S. at 186 (Breyer, J., dissenting). With each bankruptcy, "the remaining defendants come under greater financial strain and the funds available for compensation become closer to exhaustion." *Id.* at 169 (Kennedy, J., dissenting) (citation omitted). The Court itself has recognized this problem in other cases. See *Metro-North*, 521 U.S. at 435-436 ("In a world of limited resources, would a rule permitting immediate large-scale recoveries for * * * fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?"); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 598 (1997) ("exhaustion of assets threatens and distorts the process; and future claimants may lose altogether") (quoting Report of the Judicial Confer-

ence Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991)).

It was in direct response to the concern that broad liability for fear of cancer might "bankrupt defendants," and thereby deplete the funds available to those who actually suffer from the disease, that the Court emphasized the availability of "verdict control devices" in fear-of-cancer cases, including a "genuine and serious fear" jury instruction. *Ayers*, 538 U.S. at 159 n.19. One of the important limitations on recovery set forth in *Ayers* is thus that the plaintiff must establish, *to the satisfaction of the jury*, that his fear of cancer is "genuine and serious." The limitation set forth in the decision below, by contrast, is that the plaintiff need only present sufficient evidence to withstand a defense motion for a directed verdict. As this case itself demonstrates, that standard is far easier to satisfy than the actual standard of *Ayers*. Under the decision below, therefore, fear-of-cancer recovery will be far more readily available than *Ayers* either contemplates or permits.

Ayers strikes a balance. It allows asbestosis plaintiffs to be compensated for fear of cancer as part of their damages for pain and suffering. Sensitive to the concerns of the four dissenting Justices, however, it also seeks to ensure that there is a meaningful limitation on such damages, so that they cannot be recovered as a matter of course, to the detriment of defendants and cancer victims alike. By dispensing with one of the critical "verdict control devices" identified by the Court, the decision below upsets that careful balance.

Nor could the court of appeals be said to have compensated for its elimination of a jury instruction with rigorous sufficiency-of-the-evidence review—

another of the "verdict control" mechanisms identified in *Ayers*. On the contrary, the court found legally sufficient evidence of a "genuine and serious" fear of cancer based on little more than respondent's own testimony that he had a "concern" and "anxiety" about the possibility that he might contract the disease in the future. Even robust sufficiency-of-the-evidence review would not be an adequate substitute for a properly instructed jury, but the court's toothless sufficiency review makes the refusal to charge the jury all the more problematic.

2. Six years after *Ayers*, the concerns that led the Court to emphasize the importance of "verdict control devices" are still very much present. Indeed, far from having abated, the "asbestos-litigation crisis" (*Amchem Prods.*, 521 U.S. at 597) has worsened.

In his *Ayers* dissent, Justice Kennedy noted that as many as 26 corporate asbestos defendants had filed for bankruptcy in the two years since January 1, 2000. 538 U.S. at 169 (dissenting opinion). After only two more years, that estimate had climbed to 37—more than in the previous two decades combined. Stephen J. Carroll et al., ASBESTOS LITIGATION 109 (Rand Institute for Civil Justice 2005). Despite this Court's frequent pleas for a legislative solution (see *Ayers*, 538 U.S. at 166; *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 821 (1999)), reform efforts failed in Congress in 2006, with the pace of litigation only increasing thereafter (see, *e.g.*, Scott Sabatini, *Plaintiffs' Attorneys Weathered the Asbestos Political Storm*, MADISON COUNTY (ILL.) RECORD, Jan. 7, 2009). And "the litigation is far from over"; as of 2005, as many as two million asbestos claims had yet to be filed. Carroll et al., *supra*, at 106.

As the pool of resources available to asbestos plaintiffs shrinks, the pace of claims suggests that "[o]nly those individuals who can sprint to the courthouse door" will be able to recover. David Marcus, *Some Realism About Mass Torts*, 75 U. Chi. L. Rev. 1949, 1984 (2008). But the worst consequences of asbestos exposure—such as mesothelioma, an excruciating and incurable form of cancer—do not reveal themselves for many years. See *Ayers*, 538 U.S. at 168-169 (Kennedy, J., dissenting). If the available funds are expended today on less deserving claims, it may well be that "tomorrow's actual cancer victims will recover nothing—for medical costs, pain, or fear." *Id.* at 186 (Breyer, J., dissenting).

3. The question whether a FELA defendant has a right to have the jury instructed that the plaintiff's alleged fear of cancer must be "genuine and serious" would be an inherently important one even if it arose only sporadically. In fact, it arises with great frequency. According to the Association of American Railroads, there were nearly 10,000 asbestos-related FELA actions against the eight largest U.S. freight railroads and Amtrak pending as of October 2008. Br. of Ass'n of Am. R.R. as Amicus Curiae at *9, *Ill. Cent. R.R. Co.* v. *Coppie*, 127 S. Ct. 497 (2008) (No. 08-271), 2008 WL 4484591. The same railroads reported an additional several hundred pending FELA cases in which the plaintiff claimed exposure to allegedly carcinogenic substances *other* than asbestos. *Id.* at *10. And these statistics do not account for asbestos-related cases brought under the Jones Act, 46 U.S.C. § 30104(a), which governs liability for injuries sustained in the workplace by seamen and "adopts 'the entire judicially developed doctrine of liability' under [FELA]." *Am. Dredging Co.* v. *Miller*,

510 U.S. 443, 456 (1994) (quoting *Kernan* v. *Am. Dredging Co.*, 355 U.S. 426, 439 (1958)).

In virtually all of these cases, and in future ones, the plaintiffs are likely to seek damages for fear of cancer. See Br. of Ass'n of Am. R.R. as Amicus Curiae, *Ill. Cent. R.R.*, *supra*, at *9 & n.7. If those cases proceed to trial, the defendants are certain to seek the "genuine and serious" instruction that this Court said was available in *Ayers*. The Court should confirm now that it meant what it said in that case, so that there is no uncertainty about defendants' entitlement to the instruction in these thousands of other cases.

4. As things currently stand, a FELA defendant's right to a "genuine and serious fear" instruction will depend on where the case is filed.

a. In Missouri, for example, a FELA defendant has no such right. The Missouri Approved Jury Instruction on injury-related damages in FELA cases—MAI 8.02—does not require an instruction on "fear of cancer," much less an instruction that such a fear must be "genuine and serious." Based on the mistaken belief that "th[is] Court in *Ayers* did not discuss or authorize jury instructions on this issue," the Missouri Court of Appeals in *Hedgecorth* concluded that "*Ayers* does not require not-in-MAI instructions detailing or explaining damages based on a fear of developing cancer," and that "the *Ayers* holding [therefore] does not require a change to the form of approved MAI instructions." 210 S.W.3d at 228-229. The court accordingly held that MAI 8.02 "must be given" in fear-of-cancer cases in Missouri trial courts, and that the instruction identified in *Ayers* may not be. *Id.* at 228.

As a consequence of the decision below, which followed *Hedgecorth* in its misreading of *Ayers* (App., *infra*, 33a-34a), the same is now true in state trial courts in Tennessee. Although the court of appeals here did not hold that any particular instruction must be given in a FELA fear-of-cancer case, it did say that delivering a "genuine and serious fear" instruction would make "little sense" and serve "little if any purpose." *Id.* at 34a. In light of these statements, Tennessee trial judges can be expected to reject defense requests to give such a charge in future cases. The combined effect of *Hedgecorth* and the decision below is thus that FELA defendants in Missouri and Tennessee courts have no right to a jury instruction on the "genuine and serious fear" limitation.

b. In other jurisdictions, trial courts faithfully apply *Ayers*. For example, Kansas' pattern jury instruction on FELA damages "suggests that defendant would be entitled to an instruction that 'plaintiff must prove any alleged fear to be genuine and serious.'" Pattern Inst. Kan. 4th Civil § 132.30 cmt. (citing *Ayers*). Although "[t]he use of pattern * * * instructions is not mandatory" in Kansas, it "is strongly recommended." *State* v. *Gallegos*, 190 P.3d 226, 233 (Kan. 2008). Unlike their counterparts in Missouri and Tennessee, therefore, Kansas trial judges can be expected to give a "genuine and serious fear" instruction on a defendant's request.

Similarly, in *Blackburn* v. *Illinois Central R.R. Co.*, 882 N.E.2d 189 (Ill. App. Ct. 5 Dist.), appeal denied, 889 N.E.2d 1114 (Ill.), cert. denied, 129 S. Ct. 497 (2008), the Appellate Court of Illinois approved the trial court's instruction that a "genuine and serious fear of cancer" is one of the "elements of dam-

ages" in an asbestos case brought under FELA. *Id.* at 193. Although the court did not specifically state that the instruction was required, it did say that the trial court had "instructed the jury in accordance with * * * *Ayers*." *Ibid.* In light of *Blackburn*, therefore, trial judges in Illinois, like their counterparts in Kansas, can be expected to grant defense requests for such an instruction.

Trial courts in other States, including Kentucky, Ohio, and Pennsylvania, have also given a "genuine and serious fear" instruction in FELA fear-of-cancer cases post-*Ayers*. See App., *infra*, 74a-78a.

c. The decision below thus deepens a conflict among the jurisdictions on whether *Ayers* should be followed or disregarded. Given the critical importance of the "genuine and serious fear" instruction as a "verdict control device[]" (*Ayers*, 538 U.S. at 159 n.19), the defendant's right to such an instruction should not depend upon the happenstance of where the case is filed—particularly because one of the very purposes of FELA was to "create uniformity throughout the Union" (*Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908))).

The lack of uniformity in instructing on this element is especially problematic because it is certain to lead to forum shopping. A FELA plaintiff may file an action in either state or federal court in any district in which the railroad conducts business (45 U.S.C. § 56), and if a case is filed in state court, the railroad may not remove it to federal court (28 U.S.C. § 1445(a)). Each of the four largest railroads in the United States, including petitioner, operates in more than 20 States. See Br. of Ass'n of Am. R.R. as Amicus Curiae, *Ill. Cent. R.R.*, *supra*, at *13. If the

conflicting practices are allowed to persist, FELA plaintiffs can be expected to file asbestos-related actions in jurisdictions in which a "genuine and serious fear" instruction is not given. The foreseeable effect will be to dilute *Ayers*' "important" limitation on recovery (538 U.S. at 157) even further.

D. This Case Is An Ideal Vehicle For Deciding The Question Presented

This case is an ideal vehicle for confirming that *Ayers* means what it says. For one thing, the question presented was squarely pressed and passed upon in the Tennessee Court of Appeals; it was squarely pressed in petitioner's application for permission to appeal to the Tennessee Supreme Court (which denied review without explanation); and the decision below does not rest upon any independent state-law ground. See Pet. C.A. Br. 48-51; App. for Permission to Appeal 15-31; App., *infra*, 33a-34a, 45a. For another, a properly instructed jury might well have found that petitioner had not met his burden under *Ayers* and, as a result, eliminated this category of damages from its award. The issue on which review is sought could therefore prove to be outcome-determinative. Indeed, in multiple respects, this case is a textbook example of why a "genuine and serious fear" jury instruction is necessary.

First, there was very little evidence that respondent had a "genuine and serious" fear of cancer. The evidence consisted mainly of respondent's own testimony that he felt "concern" and "anxiety" about the possibility of contracting the disease. Trial Tr. 1462-1463; cf. *Ayers*, 538 U.S. at 158 & n.18 (observing that proof that fear of cancer was "genuine and serious" was "notably thin" where there was no "corroborative objective evidence of [the] fear"). While there

was also evidence that respondent took medication for his anxiety, the medication was prescribed before he was diagnosed with asbestosis, and the prescribing physician was unable to identify the cause of the anxiety. Trial Tr. 1245, 1255, 1305, 1369, 1464-1465. Under these circumstances, a properly instructed jury that "weigh[ed] [respondent's] evidence against the countervailing evidence" (App., *infra*, 36a) could easily have found that any fear of cancer here was not "genuine and serious."

Second, respondent's counsel incorrectly stated the legal standard in his summation. At one point, he suggested that respondent could recover for a "genuine" fear of cancer, omitting the additional requirement that the fear be "serious." Trial Tr. 2782. At another point, he omitted the requirement of "fear" altogether, suggesting that respondent could recover for a mere "risk" of cancer. *Id.* at 2799. A "genuine and serious fear" instruction would have minimized the possibility that the jury was influenced by counsel's misstatements.

Third, apart from misstating the law, respondent's summation repeatedly appealed to the jurors' passions and emotions. Among other things, counsel argued that petitioner had "refused to take responsibility for ruining [respondent's] life," had engaged in "outrageous" and "medically unethical" conduct, had "broke[n] * * * the law," was willing to "spend any amount of money to convince [the jury that] the truth is not the truth," and had caused the suffering and death of other railroad workers from the same "human tragedy" that it inflicted on respondent. Trial Tr. 2773, 2791, 2795-2796, 2802-2803. Because "[o]ne purpose of the 'genuine and serious' requirement * * * is to protect defendants from excessive

verdicts based on appeals to jurors' passions * * * [and] raw emotions" (App., *infra*, 34a), respondent's inflammatory summation made the failure to instruct on that requirement all the more prejudicial.

Fourth, the trial court not only refused to deliver a "genuine and serious" instruction, but refused to give *any* instruction on fear of cancer. Instead, it delivered a remarkably broad and unilluminating charge on pain and suffering, which informed the jury that respondent could recover for "*any* physical suffering and emotional suffering," and that pain and suffering "is simply what it means." Trial Tr. 2897 (emphasis added). This is therefore not a case in which the instructions that were *given* could be said to have adequately informed the jury of the principle of law in the instructions that were *refused*.

Fifth, the sheer size of the damages award—a staggering $5,000,000—provides a further reason to believe that the award would have been lower if the jury had been informed of the "genuine and serious fear" limitation. The jury was instructed that it could award damages for "reasonable and necessary medical expenses," for "loss in [respondent's] earning capacity," and for "pain and suffering." Trial Tr. 2895-2897. Given the record in this case, it is highly likely that the massive award was at least in part a function of the jurors' mistaken belief that they could award pain-and-suffering damages for *any* fear of cancer, no matter how insubstantial, or even for a "risk" of contracting the disease.[3]

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[3] For example, despite his claimed toxic encephalopathy, respondent never misrepaired a locomotive due to memory problems or injured himself or a co-worker due to inattention or lack of concentration; he continued to hold a second job as a success-

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for plenary review. In the alternative, the petition should be granted and the judgment below summarily reversed.

Respectfully submitted.

GARETH S. ADEN
CHRISTOPHER W. CARDWELL
Gullett, Sanford, Robinson & Martin, PLLC
315 Deaderick Street
Nashville, TN 37219
(615) 244-4994

EVAN M. TAGER
DAN HIMMELFARB
Counsel of Record
STEPHEN E. SACHS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

RANDALL A. JORDAN
GRANT BUCKLEY
KAREN JENKINS YOUNG
CHRISTOPHER R. JORDAN
The Jordan Firm
1804 Frederica Road
St. Simons Island, GA 31522
(912) 638-0505

H. DEAN CLEMENTS
Spears, Moore, Rebman & Williams
801 Broad Street
Chatanooga, TN 37402
(423) 756-7000

Counsel for Petitioner

FEBRUARY 2009

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ful preacher, and delivered sermons on a popular radio program; he gave intelligent and medically sophisticated testimony at trial; and he was still driving a car at the time of trial, when he was 67. Trial Tr. 240-241, 1367 1377, 1389-1390, 1429, 1434-1438, 1441-1442, 1451-1452.

APPENDICES

APPENDIX A

Court of Appeals of Tennessee

Thurston HENSLEY,

v.

CSX TRANSPORTATION, INC.

No. E2007-00323-COA-R3-CV.

Feb. 6, 2008 Session at the University of Tennessee College of Law.[1]

March 14, 2008.

Opinion and Order on Petition for Rehearing April 3, 2008.

Application for Permission to Appeal Denied by Supreme Court Nov. 17, 2008.

Appeal from the Circuit Court for Hamilton County, No. 02C153; Jacqueline E. Schulten, Judge.

Gareth S. Aden and Christopher W. Cardwell, Nashville, Tennessee; Randall A. Jordan, Grant Buckley, Karen Jenkins Young, and Christopher R. Jordan, St. Simons Island, Georgia; and H. Dean Clements, Chattanooga, Tennessee, for the appellant, CSX Transportation, Inc. H. Douglas Nichol, Knoxville, Tennessee, and Joseph D. Satterley, Louisville, Kentucky, for the appellee, Thurston Hensley.

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[1] Oral argument was heard in this case before law students at the University of Tennessee College of Law as a part of the Court's annual Docket Day at the College.

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which SHARON G. LEE, J., and NORMA McGEE OGLE, Sp. J., joined.

CHARLES D. SUSANO, JR., Judge.

Thurston Hensley ("Employee") sued CSX Transportation, Inc. ("Railroad") pursuant to the Federal Employees Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (2008), alleging that he contracted toxic encephalopathy and asbestosis in the course and scope of his employment as an electrician with Railroad. The case was tried to a jury, which found in favor of Employee and awarded him $5,000,000 in compensatory damages. Railroad appeals, alleging that the trial court erred in the following ways: by directing a verdict against it on the Railroad's statute of limitations defense; by charging the jury with divergent standards of negligence and causation with regard to Railroad's negligence and Employee's negligence; by giving the jury a verdict form that, according to Railroad, predetermined the issue of whether Employee actually had the diseases he claims; by failing to instruct the jury that a plaintiff's fear of cancer must be "genuine and serious"; by failing to declare, as a matter of law, that Employee's evidence did not satisfy that standard; and by failing to declare a mistrial because of Employee's closing argument, which Railroad claims was inflammatory. We reject all of Railroad's arguments. Accordingly, we affirm.

OPINION

I.

Only a very brief outline of the facts is needed here; additional details will be discussed as appropriate in our analyses of the issues raised by Railroad. Employee began working as an electrician for

Railroad in 1971. His work exposed him to asbestos and to a cleaning agent called Dowclene. These exposures form the basis of Employee's lawsuit against Railroad. Employee claims that repeated, long-term, high-dose exposure to these substances caused him to contract asbestosis, a lung disease, and toxic encephalopathy, a brain disease. Employee presented evidence that Railroad was aware for years of the dangers posed by asbestos and Dowclene, but that it still exposed him to them, failed to educate him about the risks and failed to provide adequate safeguards to ensure that his working conditions were safe. Railroad denies all of the operative allegations of the complaint. Specifically, it contends that Employee does not have either asbestosis or encephalopathy; that his exposure to asbestos and Dowclene was minimal and non-damaging; that whatever physical ailments he has were not caused by such exposure; and that Employee *was* educated about the risks and that proper safety procedures *were* followed. The jury sided with Employee. Railroad appeals.

State and federal courts have concurrent jurisdiction over FELA claims. *See* 45 U.S.C. § 56. "In FELA cases tried in state courts, the applicable state rules generally govern procedural matters, while federal law controls as to all matters of substantive law." *Jennings v. Illinois Cent. R.R. Co.*, 993 S.W.2d 66, 70 (Tenn. Ct. App. 1998). State procedural rules give way to federal law if "application of [state] rules would interfere with a party's substantive federal rights or defenses." *Pomeroy v. Illinois Cent. R.R. Co.*, No. W2004-01238-COA-R3-CV, 2005 WL 1217590, at *12 (Tenn. Ct. App. W.S., filed May 19, 2005) (citing *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296, 70 S. Ct. 105, 94 L. Ed. 100 (1949)).

The United States Supreme Court has held that a jury verdict in a FELA case is entitled to great weight on appeal. *See Biddle v. Norfolk S. Ry. Co.*, No. E1999-025840-C0A-R3-CV, 2000 WL 1185575, at *6 (Tenn. Ct. App. E.S., filed August 22, 2000); *Gentry v. Norfolk S. Ry. Co.*, No. 03A01-9610-CV-00341, 1997 WL 406377, at *3 (Tenn. Ct. App. E.S., filed July 22, 1997). "Only when there is a complete absence of probative facts to support the conclusion reached (by the jury) does a reversible error appear." *Dennis v. Denver & Rio Grande W. R.R. Co.*, 375 U.S. 208, 210, 84 S. Ct. 291, 11 L. Ed. 2d 256 (1963) (*quoting Lavender v. Kurn*, 327 U.S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916 (1946)). Thus, where Railroad challenges the sufficiency of the evidence to support an aspect of the jury's verdict, we may not re-weigh the evidence or assess the credibility of witnesses in reaching a conclusion contrary to the verdict. *Lavender*, 327 U.S. at 652-53. Our "function is exhausted when [the verdict's] evidentiary basis becomes apparent, it being immaterial that the [reviewing] court might draw a contrary inference or feel that another conclusion is more reasonable." *Id.* at 653. This is essentially the standard of review for jury cases under Tennessee law, pursuant to which we are "required to take the strongest legitimate view of all the evidence in favor of the verdict, to assume the truth of all [evidence] that tends to support [the verdict], allowing all reasonable inferences to sustain the verdict, and to discard all [evidence] to the contrary." *Forrester v. Stockstill*, 869 S.W.2d 328, 329 (Tenn.1994) (citation omitted). In short, we must affirm the jury's verdict if there is any material evidence to support it. *Id.*

In addition to sufficiency questions, Railroad challenges the propriety of some of the jury instruc-

tions. Because the substantive law of FELA cases is federal, jury instructions must correctly reflect the controlling federal common law. *Palmer v. Norfolk-Southern Ry. Co.*, No. 03A01-9309-CV-00313, 1994 WL 111037, at *2 (Tenn. Ct. App. E.S., filed March 30, 1994). The determination of whether jury instructions are proper is a question of law to be reviewed by us *de novo* with no presumption of correctness. *See Solomon v. First Am. Nat'l Bank*, 774 S.W.2d 935, 940 (Tenn. Ct. App. 1989). "Since the instructions are the sole source of the legal principles needed to guide the jury's deliberations, trial courts must give substantially accurate instructions concerning the law applicable to the matters at issue." *Ladd v. Honda Motor Co.*, 939 S.W.2d 83, 94 (Tenn. Ct. App. 1996) (citations omitted). However, "[j]ury instructions need not be perfect in every detail." *Id.* We must consider the jury charge as a whole, and we will not invalidate it if it fairly defines the legal issues in the case and does not mislead the jury. *See Hunter v. Burke*, 958 S.W.2d 751, 756 (Tenn. Ct. App. 1997). The federal courts take a similar approach:

> We review jury instructions as a whole to determine whether they adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury in reaching its decision. A judgment on a jury verdict may be vacated when the instructions, viewed as a whole, were confusing, misleading, and prejudicial. It is not error to refuse to give a requested instruction that correctly states the law, as long as the instructions actually given fairly and adequately cover the material issues.

Jones v. Consolidated Rail Corp., 800 F.2d 590, 592 (6th Cir.1986) (citations omitted).

Standards of review for the additional issues raised by Railroad will be discussed as those issues are reached by us. We address each of Railroad's five issues in turn.

II.

Railroad first argues that the trial court erred when it directed a verdict for the Employee with respect to Railroad's claim that Employee's suit was filed outside the FELA's three-year statute of limitations. A directed verdict "is appropriate only when the evidence is susceptible to but one conclusion." *Alexander v. Armentrout*, 24 S.W.3d 267, 271 (Tenn. 2000). In reviewing whether a trial court acted properly in directing a verdict, we must "take the strongest legitimate view of the evidence favoring" the party against whom the verdict was granted. *Id.* (*quoting Long v. Mattingly*, 797 S.W.2d 889, 892 (Tenn. Ct. App. 1990)). If reasonable minds could differ as to the conclusions to be drawn from the evidence presented, a directed verdict is not appropriate.

Employee was diagnosed with toxic encephalopathy and asbestosis on May 24, 2000; he filed suit on January 10, 2002, less than two years later and well within the three-year statute of limitations. However, as Railroad rightly points out, the test for statute of limitations purposes is not necessarily whether a formal diagnosis has occurred. The statute begins to run as soon as the injured party is "in possession of the critical facts" necessary to discover that a potential cause of action exists-namely, "that he has been hurt and who has inflicted the injury."

United States v. Kubrick, 444 U.S. 111, 122, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979). Railroad also correctly notes that an affirmative duty to investigate one's symptoms and their causes arises when a claimant "should have known" that such an investigation was needed; in these cases, the statute of limitations will "start[ ] to run when a reasonable person would know enough to prompt a deeper inquiry[.]" *Nemmers v. United States*, 795 F.2d 628, 631 (7th Cir. 1986). The question that must be answered, therefore, is not simply when Employee was first diagnosed with the subject illnesses, but when he first knew-or should have known-of the critical facts: (1) that he had these illnesses, and (2) that they were caused by Railroad. If he knew or should have known the critical facts prior to January 10, 1999, then his action is time-barred.

Railroad contends that the trial court sidestepped this critical timing issue by ruling that the statute of limitations was equitably tolled because of brain damage to Employee-allegedly a symptom of his solvent exposure-during the period when the statute might otherwise have run. Although it is unclear to us whether the trial court was invoking "equitable tolling" or was simply applying the reasonable-person standard to Employee's circumstances, it is true that Employee's alleged brain damage was initially the court's sole stated rationale for ruling as it did on this point:

> [R]egardless of the cause of this man's condition[,] in terms of his memory, brain functioning, whatever you want to call his deficit, I think that precludes the statute of limitations issue that he knew or should have

> known of what he complains of in this lawsuit.

However, the court later cited an additional rationale for its conclusion that the statute of limitations had not run on Employee's claim: namely, that the quantum of Employee's pre-1999 knowledge was insufficient to support a finding that he knew or should have known the critical facts, regardless of whether he was suffering brain damage during the period in question. The court stated:

> I have really already ruled that I don't believe, given the factual scenario of this case if nothing else, that somebody with brain damage could have known or should have known.
>
> * * *
>
> I remember also that besides my feeling about it as known or should have known, that his first symptoms, if I'm not mistaken, were headache and bloating. Certainly as I remember the proof, that was not classic symptoms of [toxic encephalopathy]. I don't know that with this big of a disputed and complicated diagnosis that any of us would have known that bloating and headaches could be a problem. If my recollection of the proof is correct, [and] I stand to be corrected, that's what I'm going to rule on that.

Railroad's attorney did not take up the trial judge's offer to "correct[ ]" her "recollection of the proof"—probably because the court's recollection was accurate, as will be seen.

We believe this second rationale for the trial court's conclusion on the statute of limitations issue

is more convincing than the "brain damage" rationale. Accordingly, we decline to address Railroad's arguments with respect to the trial court's "brain damage" theory, since the lower court's ruling will stand so long as the second theory is adequately supported. We "will affirm a decree correct in result, but rendered upon different, incomplete, or erroneous grounds." *Continental Cas. Co. v. Smith*, 720 S.W.2d 48, 50 (Tenn. 1986). *See also Shutt v. Blount*, 194 Tenn. 1, 249 S.W.2d 904, 907 (Tenn. 1952) ("if the Trial Judge reached the right result for the wrong reason, there is no reversible error").

As the trial court noted, the only evidence presented by Railroad that might be seen as tending to establish *both* "critical facts"-Employee's claimed illnesses and their purportedly work-related cause-relates to two particular symptoms: headaches and bloating. Yet although there was evidence that Employee had these symptoms prior to 1999 and suspected that they might be work-related, no evidence was presented that they *were* work-related, *i.e.*, that they actually resulted from Employee's exposure to solvents or asbestos, or that they are in fact symptoms of Employee's encephalopathy or asbestosis. Indeed, Employee's doctor, Michael Kelly, while under cross examination by Railroad's counsel, conceded that the headaches were *not* a symptom of solvent exposure:

> Q: Mr. Hensley told you he has constant headaches.
>
> A: He does have headaches.
>
> Q: And I think you'll agree with me that headaches are not a symptom of—a chronic symptom of exposure to solvents.

A: You wouldn't expect them to be, correct.

Further, as Employee notes in his brief, "No witness testified that the bloating was the result of chemicals at all." In its reply brief, Railroad does not contest this point, and appears to concede the "headaches" issue, describing Employee's "belief of a link" between headaches and solvent exposure as "incorrect." This is crucial, because Railroad's argument relies heavily upon testimony that Employee was urged by fellow employees and by his wife to see a "poison doctor" *for his headaches and bloating*. There is no evidence that anyone urged Employee to see a "poison doctor" about his other, ultimately more relevant symptoms (*e.g.*, dizzy spells, cognitive problems, shortness of breath), nor is there any other evidence to suggest that Employee knew or should have known that *those* symptoms were work-related. Railroad's argument fundamentally rests upon the notion that Employee knew or should have known that his headaches and bloating were work-related-even though, according to this record, they were not.

Railroad says this is immaterial. "It matters not whether Plaintiff was correct in his belief that the headaches were caused by solvents," Railroad argues in its brief. "The legal issue is whether his belief raised a duty to investigate, thus triggering the running of the statute of limitations." We disagree with this logic insofar as it appears to suggest that knowledge of *any* purportedly work-related symptom-even if ultimately proven non-work-related and, in any event, irrelevant to the claims at issue-gives rise to a general duty to investigate one's physical condition, which in turn causes the statute of limitations to run with regard to any and all unknown work-related injuries that may happen to exist contemporaneously

with the known, non work-related injury. This seems to us the necessary implication of Railroad's argument, and we cannot accept it. Contrary to Railroad's contention, we hold that it *does* matter whether the condition that a plaintiff is under a duty to investigate is the same condition that he is seeking damages for. The duty to investigate is, at least broadly speaking, condition-specific. A defendant cannot rely on a plaintiff's prior erroneous belief that a different, unrelated condition was work-related in order to retroactively trigger the statute of limitations on the far more serious condition that the plaintiff ultimately discovers and for which he sues.

If Employee were suing for damages caused by his headaches and bloating, his action might well be time-barred; certainly under that scenario a fact issue for the jury would have been created. However, he is not suing for "headaches and bloating," but rather for damages caused by toxic encephalopathy and asbestosis. There is absolutely no evidence linking his headaches or bloating to these conditions, nor any evidence suggesting that his pre-1999 knowledge of *actual* encephalopathy and asbestosis symptoms-such as cognitive problems and shortness of breath-was coupled with knowledge sufficient to put him on notice of a connection between *those* symptoms and his work for Railroad. Nor do we believe that the evidence presented regarding Employee's encephalopathy and asbestosis symptoms could have given rise to a reasonable inference that such constructive notice existed. Perhaps a jury could conclude that Employee had a vague suspicion of his injuries and their causes, but we agree with the Supreme Court of Virginia that "[a]n employee's *mere suspicion* of an injury or its probable cause, standing alone, is not the operative standard for determining when a cause of

action accrues under FELA." *Gay v. Norfolk & W. Ry. Co.*, 253 Va. 212, 483 S.E.2d 216, 217 (Va. 1997) (emphasis added). For all of these reasons, we conclude that a directed verdict in Employee's favor on this issue was proper. Simply stated, Railroad did not present the evidence needed to establish a statute of limitations defense, and thus there was no factual dispute to be resolved by a jury.

III.

A.

Railroad's second argument is that the judgment must be reversed because the jury instructions and verdict form created a "double standard" between, on the one hand, the levels of negligence and causation that Employee was required to prove, and, on the other hand, the levels of *comparative* negligence and causation that Railroad was required to prove. Railroad asserts that such inconsistency was declared improper by the United States Supreme Court in *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed. 2d 638 (2007), a case that was decided after the judgment below but before this appeal.

The judge instructed the jury, in pertinent part, as follows:

> In this action Mr. Hensley has the burden of establishing by a preponderance of the evidence all the facts necessary to prove the following issues: *Was CSX negligent even in the slightest*; and did that negligence cause injury to Mr. Hensley; and what damages, if any, is he entitled to.
>
> The defendant, CSX has the burden of establishing by a preponderance of the evidence all

> of the facts necessary to prove the following issues: *was Mr. Hensley negligent*, and did that negligence contribute to his injuries.
>
> * * *
>
> If a carrier such as CSX Transportation was negligent and its negligence was a cause *in whole or in part* of Mr. Hensley's injuries, CSX Transportation is liable in damages, although CSX Transportation's negligence was not the sole cause of the injuries and although the negligence of a third person may have contributed in equal, greater, or lesser degree in causing injury.
>
> In deciding this case you must determine the fault, if any, of each of the parties. If you find more than one of the parties at fault, you will then compare the fault of the parties. To do this you will need to know the definition of fault. CSX is at fault if you find that CSX *was negligent, even in the slightest,* and that the negligence was a legal cause of injury to Mr. Hensley. The plaintiff, Mr. Hensley, is a[t] fault if you find that *he was negligent* and that negligence was a legal cause of his injury.
>
> * * *
>
> If you find that CSX *was negligent, even in the slightest, and/or Mr[.]* Hensley *was negligent* and that this negligence was a legal cause of the injury or damages for which a claim is made, you have found that party to be at fault.

(Emphasis added.) In addition, the verdict form stated as follows:

1. Do you believe from the evidence that CSX was *negligent, even the slightest*, and such negligence was a *cause, in whole or in part*, of the asbestosis the Plaintiff claims?

YES ____ NO ____

Do you believe from the evidence that CSX was *negligent, even the slightest*, and such negligence was a *cause, in whole or in part*, of the toxic encephalopathy the Plaintiff claims?

YES ____ NO ____

If you check "NO" to both numbers 1 & 2, please return to the courtroom.

3. Do you believe from the evidence that Mr. Hensley was *negligent* and such negligence was a *cause* of his claimed [injuries?]

(Emphasis in paragraphs 1, 2, and 3 added; other emphasis in original).

Railroad argues that these instructions and the jury verdict form are improper under *Sorrell*, a case that arose out of Missouri litigation under FELA in which the instructions stated that the employee is contributorily negligent if his negligence "directly contributed to cause" the injury, *Sorrell*, 127 S. Ct. at 803, while the railroad is judged by whether its negligence "contributed in whole or in part" to the injury. *Id.* at 814.The Supreme Court invalidated that instruction, saying it was based on an incorrect reading of FELA, and declared that "the same standard of causation applies to railroad negligence under Section 1 [of FELA] as to plaintiff contributory negligence under Section 3." *Id.* at 808.

The parties take contrary positions with respect to *Sorrell's* applicability to various aspects of this case, including whether the standards of not just causation, but also negligence (*i.e.*, breach), must be equal. For the sake of argument only, we will assume that Railroad is correct and that the instructions and verdict form in the instant case are improper under *Sorrell*. Railroad still loses this issue because it explicitly conceded the correctness of the trial court's jury instruction on the issue at hand, thereby inviting any error that the trial court may have committed.

B.

"Tenn. R. Civ. P. 51.02 provides that a party may seek a new trial because of an inaccurate instruction, even if it did not object to the instruction at trial." *Grandstaff v. Hawks*, 36 S.W.3d 482, 489 (Tenn. Ct. App. 2000). In the instant case, Railroad cited both the jury instructions and the verdict form[2] in its mo-

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[2] We note that, although a party's failure to object is nonfatal with regard to erroneous instructions, *omissions* from jury instructions must be objected to, or the issue is waived. *Rule v. Empire Gas Corp.*, 563 S.W.2d 551, 553 (Tenn. 1978). In addition, errors or omissions in a *verdict form* are waived unless objected to at trial. *Keith v. Murfreesboro Livestock Market, Inc.*, 780 S.W.2d 751, 759 (Tenn. Ct. App. 1989). However, as will be seen, we hold that Railroad invited error with regard to all of the disputed instructions *and* the verdict form. Thus, we need not decide whether the purported problems with the instructions are properly characterized as errors or as omissions, nor whether Railroad's objection to other aspects of the verdict form, coupled with its offer of an alternative verdict form that did not contain the language disputed here, is sufficient to establish that Railroad raised the verdict-form issue.

tion for a new trial.[3] However, Railroad cannot claim the protection of Rule 51.02, because Railroad did not merely fail to object at trial to the instructions and form; *it affirmatively acquiesced in them, explicitly asserting that they were legally correct.* The transcript clearly demonstrates this fact:

> [EMPLOYEE'S COUNSEL]: I handed you what really is the verdict-one of the proposed verdict forms, and my point was that the-as to causation, I looked at our causation instructions and the causation instruction I think just needs to be added in whole or in part under-under the claim of negligence, whenever there's a reference to cause, it just should be comma, in whole in or part. Because under FELA law, unlike regular negligence actions, the law is in whole or in part.
>
> [RAILROAD'S COUNSEL:] *I agree with that, Your Honor.*
>
> * * *
>
> [EMPLOYEE'S COUNSEL:] And its negligence was a cause, in whole or in part. And, really, the theme throughout all the instructions, whenever the question is about cause or causation, should just be that same entry throughout that and that would satisfy the causation aspect of the case.

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[3] Railroad's motion objects specifically to the inconsistent *negligence* standards. The motion makes no specific comment on the inconsistent causation standards. Employee contends that the motion raises only the negligence issue, not the causation issue. As will be seen, we need not decide this question, as we find that both issues were conceded notwithstanding the motion for a new trial.

THE COURT: Okay.

[EMPLOYEE'S COUNSEL:] The other issue that I think we raised yesterday, Your Honor, I think we're [*i.e.*, Employee and Railroad] probably in agreement on this as well. It relates to the negligence standard.

THE COURT: Okay.

[EMPLOYEE'S COUNSEL:] It's the same type of situation under FELA. It's negligence, comma, even the slightest, comma. Because under the FELA law the burden or the standard is much less than the regular negligence, so whenever Your Honor gives instructions on negligence, it's even the slightest negligence.

THE COURT: Okay.

[EMPLOYEE'S COUNSEL:] I think we're in agreement on that, aren't we, Randy [Railroad's counsel]?

[RAILROAD'S COUNSEL:] Yeah, *I'm fine with that, Your Honor. I don't like it, but it's the law.*

[EMPLOYEE'S COUNSEL:] It's amazing. I like it when lawyers know the law. And Randy, obviously, has handled enough of these railroad cases that [he knows] that's the law and we're stuck with it.

* * *

[EMPLOYEE'S COUNSEL:] [I]f Your Honor does decide to give the comparative negligence [instruction] ... the "in whole or in

part" part for the railroad doesn't apply to Mr. Hensley.

THE COURT: Correct.

[EMPLOYEE'S COUNSEL:] That's only for the railroad.

THE COURT: That's why I just added on on the top one, the Plaintiff, was CSX negligent in whole or in part and did that negligence cause injury.

[EMPLOYEE'S COUNSEL:] Actually, the negligence is even in the slightest, the causation is in whole or in part.

THE COURT: I'm sorry. All right.

[EMPLOYEE'S COUNSEL:] It's complicated. It took me several years to figure this thing out.

THE COURT: Even in the slightest?

[EMPLOYEE'S COUNSEL:] Even in the slightest.

THE COURT [addressing Railroad's counsel]: Is that-I understand you don't like it, but is that all right with you?

[RAILROAD'S COUNSEL:] *It makes me a little ill every time I hear it, but that's where we are, Judge.*

THE COURT: Okay.

(Emphasis added.)

Although Railroad could have overcome a mere failure to object to purportedly erroneous instructions by taking issue with them in its motion for a new trial, its concessions at trial constitute "invited

error," which is not so easy to overcome. As this court noted in *Knoxville Cmty. Dev. Corp. v. Bailey*, No. E2004-01659-COA-R3-CV, 2005 WL 1457750, at *5 (Tenn. Ct. App. E.S., filed June 21, 2005), invited error is separate and distinct from mere failure to object under Rule 51.02. We pointed out in *Bailey* that the Tennessee Supreme Court held in a 1937 case-admittedly before the adoption of Rule 51.02-that the rule of invited error applies to jury instructions. *Gentry v. Betty Lou Bakeries*, 171 Tenn. 20, 100 S.W.2d 230, 231 (Tenn. 1937). That statement of law was reiterated in a post-Rule 51.02 case, *Roseberry v. Lippner*, 574 S.W.2d 726, 729 (Tenn. 1978), in which the Supreme Court held that an erroneous jury instruction "was invited error, and plaintiff will not be heard to complain on appeal of error which she induced the Court to commit." But the clearest and most directly applicable analysis of the interplay between invited error and Rule 51.02 comes from *Haddock v. Lummus Cotton Gin Co.*, 552 S.W.2d 390, 391 (Tenn. Ct. App. 1976), in which this court refused to consider a plaintiff's argument against the validity of an instruction about which he had stated at trial, "The Plaintiff does not object to the instructions as given. We don't think it prejudices the Plaintiff's case.... I have no objection to the charge." The Court of Appeals, after quoting Rule 51.02, stated:

> Admittedly, if Plaintiff had made no comment on the portion of the charge complained of on this appeal, under 51.02 he could assign error to any portion of the charge in this Court. However, since the Plaintiff took affirmative action by asking for permission to amend his theory of the case to conform to the charge of the Court and approved the charge, we hold that Plaintiff's assignment of

> error in this Court is not authorized by T.R.C.P. 51.02.
>
> The situation is analogous to a party assigning error to a charge which he had requested. After the jury's verdict, it was too late to question the correctness of the charge.
>
> It is, therefore, unnecessary to discuss the cases cited and relied upon by Appellant relating to the correctness of the charge complained of.

Id. at 392. The facts of *Haddock* are directly on point with the facts in the instant case. Like the plaintiff in *Haddock*, the defendant here, Railroad, "took affirmative action" by explicitly acquiescing to both the disputed instructions and the verdict form. By saying "I agree with that" and "I don't like it, but it's the law" and "[i]t makes me a little ill every time I hear it, but that's where we are," Railroad, in the words of the *Haddock* court, "approved the charge[s]." After losing the case, Railroad attempted to "unring the bell" in its motion for a new trial, but it was too late. It invited the very error of which it now complains.

C.

Admittedly, the issues of invited error and waiver are complicated by the intervening precedent of *Sorrell*. When the United States Supreme Court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule ." *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed.2d 74 (1993). This principle of retroactivity

could be weakened by strict application of the rule prohibiting litigants from appealing errors that they invited, or did not object to, at trial, where the error was not apparent prior to the Supreme Court ruling. Such a holding would risk encouraging a flood of frivolous trial objections, since it would create a powerful incentive for attorneys to raise every currently invalid objection that could conceivably be vindicated by an unexpected Supreme Court ruling months or years in the future. On the other hand, completely eviscerating the doctrines of waiver and invited error[4] in all cases wherein the law changes during the pendency of an appeal would undermine the important purposes of those doctrines. This latter point was implicitly recognized by the Tennessee Supreme Court in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn.1992), the landmark case that replaced contributory negligence with comparative negligence in Tennessee. The High Court declared that "[t]he principles set forth today apply to (1) all cases tried or retried after the date of this opinion, and (2) all cases on appeal *in which the comparative fault issue has been raised* at an appropriate stage in the litigation." *Id.* at 58 (emphasis added). In other words, parties

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[4] Waiver and invited error are, as just noted, two distinct legal doctrines. Waiver is applicable to verdict forms and jury-instruction omissions, but inapplicable to erroneous instructions; invited error is applicable to all of the above. However, both doctrines involve situations where a litigant has failed to preserve an issue for appeal, whether through action (inviting error by acquiescing in a decision) or through inaction (waiving an issue by failing to object to a decision). Thus, for purposes of determining whether an intervening change in precedent excuses a litigant's failure to preserve an issue, there is little difference between waiver and invited error; the latter is, for these purposes, essentially just an enhanced version of the former.

who had not objected at trial to the all-or-nothing contributory negligence scheme were out of luck-even though that scheme was undoubtedly thought to be "the law" when their cases were tried.

Although the court in *McIntyre* did not specifically explain its reasoning with regard to retroactivity, it is likely that the court was cognizant of the fact that a raging debate about the merits of comparative versus contributory negligence had been ongoing well before the decision in *McIntyre*, and Tennessee was one of only a handful of states still using the traditional all-or-nothing approach until *McIntyre* brought Tennessee into line with the majority of other jurisdictions. In other words, it could not be said that the ruling was a *complete* surprise. Although contributory negligence remained the law until *McIntyre*, it was widely known that a change might be coming. Indeed, the court had put everyone on notice of a possible change fifteen years earlier by stating, "We do not deem it appropriate to consider making such a change [from contributory to comparative negligence] unless and until a case reaches us wherein the pleadings and proof present an issue of contributory negligence accompanied by advocacy that the ends of justice will be served by adopting the rule of comparative negligence." *Street v. Calvert*, 541 S.W.2d 576, 586 (Tenn. 1976). The Supreme Court quoted this language in *McIntyre* and stated, "Such a case is now before us." 833 S.W.2d at 56. It seems fair, therefore, that the court limited the ruling's retroactivity to those cases where the issue had been raised at trial. In essence, this approach strikes a balance between the important purposes served by retroactivity, on the one hand, and waiver or invited error, on the other.

Such a balancing approach was championed by Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit when he declared that "[a] party should be allowed to take advantage of a decision rendered during the pendency of his case, even if he had not reserved the point decided, if the decision could not reasonably have been anticipated." *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 108 (7th Cir. 1990) (emphasis added). That last point, we think, is crucial. Closing the door on waived arguments only where the intervening change in precedent "could ... reasonably have been anticipated" respects and adheres to the spirit of both of the competing legal principles, requiring parties to raise all pertinent or potentially pertinent issues at trial but declining to penalize them for failing to raise issues whose resolution in their favor was totally unforeseeable. Moreover, with respect to Judge Posner's expressed fear that universal application of the waiver doctrine "would induce parties to drown the trial judge with reservations," *Id.*, his "could not reasonably have been anticipated" rule is philosophically consistent with Rule 11 of both the federal and Tennessee Rules of Civil Procedure, which prohibit attorneys from making a representation to the court unless "the claims, defenses, and other legal contentions therein are warranted by existing law *or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.*" Tenn. R. Civ. P. 11.02(2) (2007) (emphasis added); *see also* Fed. R. Civ. P. 11(b)(2). The *McKnight* rule avoids creating incentive for attorneys to make arguments that are "frivolous" when raised, but penalizes them for failing to make "non-frivolous" arguments for changes to the law where

such changes could reasonably have been anticipated.

D.

This analysis brings us, of course, to the question of whether the changes wrought by *Sorrell* could reasonably have been anticipated by Railroad. The answer, we think, is clearly yes. In fact, we can go a step further and say that the changes *were* anticipated. After all, as noted earlier, Railroad complained about the very question at issue here in its motion for a new trial. That motion was filed on October 27, 2006, more than two months *before* the *Sorrell* decision was announced. The law did not change during the 29 days between the above-quoted discussion-in which Railroad's attorney said of the disputed instructions, "I don't like it, but it's the law"-and the filing of Railroad's motion for a new trial, which argued that the instructions were "erroneous statements of the law" that "set[ ] up a clear double standard."

A brief timeline of events will help clarify matters. On May 15, 2006, the United States Supreme Court announced that certiorari had been granted by the Court in the *Sorrell* case to address the following question: "Whether the court below erred in determining that the causation standard for railroad negligence under the Federal Employers Liability Act ('FELA') differs from the causation standard for employee contributory negligence." *Norfolk Southern Ry. Co. v. Sorrell*, 547 U.S. 1127, 126 S. Ct. 2018, 2018, 164 L. Ed.2d 778 (2006) (Mem.); 2005 U.S. Briefs 746, Brief of Petitioner (U.S. S. Ct. Briefs 2006). At that time, the pre-trial phase of the instant case was well underway.

More than three months *after* the Supreme Court agreed to hear *Sorrell*, Railroad in the instant case submitted its proposed jury instructions, which included equivalent standards of causation in Charge No. 13, and also its proposed verdict form, which included equivalent standards of negligence and causation. The trial below began on September 12, 2006.

On September 27, the trial court, in the course of scheduling a discussion of the proposed jury instructions for the following morning, stated:

> Well, I mean, [Railroad] may not object [to Employee's proposed instructions]. I mean, they may realize that's the case law. *I don't know the case law that well and I want y'all to make certain there's not error there.*

(Emphasis added.) As can be seen, the trial judge admitted being somewhat unfamiliar with the relevant case law and thus wanted to ensure that both parties had ample opportunity to raise and argue any legal objections they might have to the court's proposed instructions. Yet the next day, September 28, when given that opportunity, Railroad's attorney conceded the instructions' legality, as already noted. He said, "I agree with" the causation instructions on the verdict form; he further stated, "I'm fine with [the negligence standard in the jury instructions] ... I don't like it, but it's the law"; and he admitted that the divergent standards for negligence and contributory negligence "makes me a little ill every time I hear it, but that's where we are, Judge."

The following morning, September 29, shortly before charging the jury, the trial court asked the parties, "Is there any other part of the charge ... Is there anything else you all saw that you didn't like[?]"

Railroad's attorney responded that Railroad was satisfied with the instructions, "[w]ith some exceptions that we want to make probably after the charge is given about the Court's failure to give some things that we talked about." The court-clearly wanting to settle any important issues *before* giving the charge-replied, "Besides the fear of cancer charge, is there anything else in particular that you are unhappy about?" Railroad's attorney responded by asking the court to alter an instruction relating to foreseeability, but said nothing about the negligence and causation "double standard." At no point did Railroad indicate that it was "particular[ly] ... unhappy" about that issue, nor indeed that it was "unhappy" at all. The court subsequently charged the jury with the now-disputed instructions and gave the jury the now-disputed verdict form. When Railroad made its promised exceptions, shortly after the jury was charged, it did *not* except to the court's refusal to give the jury its Charge No. 13, the proposed instruction that would have provided for a uniform causation standard. Railroad *did* except to the court's refusal to use the more detailed verdict form that Railroad had submitted, but this exception appears to have been based on other grounds (specifically, the "fact of disease" issue that we will address in the next section of this opinion). In sum, during the time period between Railroad's concession and the end of the trial, the record shows no indication that Railroad ever told the court it had changed its mind about the previously conceded legality of the now-disputed instructions and verdict-form language.

The jury returned its verdict later that day, September 29. The court's judgment was entered on October 2. Approximately one month later, on October 27, Railroad filed its motion for a new trial. It stated,

as one of 16 reasons why a new trial should be granted, that "[t]he Court erroneously charged the jury on the standard of care to utilize in assessing the negligence of [Railroad], and then compounded the error by 1) articulating a separate and different standard of care for assessment of Plaintiff's negligence and 2) emphasizing the errors by restating them on the jury verdict form." The memorandum in support of the motion elaborates on this claim, asserting that the jury was presented with a "clear double standard." Railroad argued in its memorandum as follows:

> In short, the Court's charge presents a relaxed "even in the slightest" negligence standard for defendant [Railroad] but a normal pure "negligence" standard for the Plaintiff.
>
> [Railroad] respectfully submits both aspects of the charge are *erroneous statements of the law* and clearly prejudicial.

(Emphasis added.) It is worth reiterating that, exactly one month earlier, Railroad's attorney had said of the very instruction at issue, "I don't like it, but it's the law." No United States Supreme Court opinion was released during the intervening month that could have converted the instruction's contents from "the law" into "erroneous statements of the law." Rather, it seems that Railroad simply changed its mind. In any event, Railroad's motion for a new trial cites, among other cases, *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820 (5th Cir. 1965) in support of its contention that the previously agreed-to instructions were in fact erroneous. Railroad described *Page* as "a clear ruling that the standard of negligence for employee and employer is the same under FELA." This citation is significant because,

when *Sorrell* was decided 75 days later, the majority opinion referred to *Page* as "[t]he most thoughtful treatment" of the issue, and essentially adopted *Page's* reasoning.

The Supreme Court released its *Sorrell* opinion on January 10, 2007. Less than two weeks later, on January 23, the trial court in the instant case rejected Railroad's motion for a new trial. The court noted the brand-new *Sorrell* opinion, stating that Railroad had "supplemented [its] argument" by bringing the case to the court's attention. However, the trial court stated that "[a] review of the case does not change the Court's opinion as to the appropriateness of the charge." The court then essentially cited a waiver or invited error theory in support of its decision, noting, "The Court held several jury charge/verdict for[m] conferences with counsel before the charge was communicated to the jury."

Railroad filed its notice of appeal on February 9, 2007. Railroad now argues that the trial court should have used Railroad's proposed instructions, and that, although Railroad subsequently agreed to the instructions that the court used instead, *Sorrell* so fundamentally changed the law that it is unfair to hold Railroad to the normal rules of waiver and invited error. Yet under the test already articulated-whether the change in the law "could ... reasonably have been anticipated"-it is abundantly clear that Railroad cannot now claim the benefit of *Sorrell* after having so explicitly disavowed its legal underpinnings at trial.

E.

Railroad's briefs are strikingly inconsistent in their characterization of *Sorrell's* impact on the law

and, by implication, the foreseeability of the High Court's ruling in that case. On the one hand, Railroad states that *Sorrell* "*confirmed what most courts had already held*-that railroads and employees should be subject to equivalent causation standards in determining negligence[.]" (Emphasis added.) Later, Railroad asserts that *Sorrell* "resolved a long-running split of authority[.]" Yet Railroad goes on to assert that it "should not now be penalized in this appeal because at trial it followed *then-prevailing law* on the standard of causation and negligence for railroad FELA liability."(Emphasis added). Railroad adds that it "could not have invited error because the trial court's ruling was consistent with *the governing law* at the time of trial."(Emphasis added). Needless to say, the notion that Railroad reasonably relied upon settled, "governing," "then-prevailing" pre-*Sorrell* law, which *Sorrell* then unexpectedly overturned, is difficult to square with the assertion that *Sorrell* "confirmed what most courts had already held." In addition, it is difficult to understand how Railroad can now rely on the jury instructions that it submitted at trial, before *Sorrell*, as being the proper application of post-*Sorrell* law, yet contend that its acquiescence at trial to the court's instructions should be disregarded because *Sorrell* so drastically and un-expectedly changed the law. If that is the case, why did Railroad submit legally unsupportable instructions? Railroad cannot have it both ways.

The bottom line is this: Railroad was given ample opportunity to argue that its submitted instructions were proper under existing law, including *Page* and the various other cases that represent, in Railroad's words, "what most courts had already held" before *Sorrell*. Presented with this opportunity to convince the trial court of its position, Railroad instead chose-

despite having submitted instructions that it claims are now proper-to concede the point, explicitly declaring the court's instructions legally correct. The trial court, which had previously told the attorneys that "I don't know the case law that well and I want y'all to make certain there's not error there," understandably saw no need to pursue this particular issue further. After all, Railroad had conceded the point, and there were many other contested issues to resolve in this complex case. Yet now, having invited the result that it now describes as error, Railroad seeks to revive the issue. This it cannot do. We will not allow Railroad to change its position on appeal after specifically conceding the point in question because of a supposedly drastic change in the law that Railroad should have anticipated, and indeed *did* anticipate (albeit inconsistently). The propriety of negligence and causation instructions that impose a "double standard" on plaintiff's and defendants under FELA was an unresolved legal issue that Railroad needed to preserve at trial if it wished to assert error on appeal, and Railroad failed to do so. Therefore, we do not reach the substantive merits of the claim.[5]

IV.

Railroad's third issue requires a much shorter discussion. Railroad claims that the verdict form improperly presupposes the fact of Employee's claimed diseases, toxic encephalopathy and asbestosis. We

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[5] We emphasize again that our opinion does not presuppose anything about the outcome of this issue if Railroad had properly preserved it. We simply do not decide that point because Railroad's invited error pretermits it.

quote again from the first two questions on the form, with a different emphasis this time:

> 1. Do you believe from the evidence that CSX was negligent, even the slightest, and such negligence was a cause, in whole or in part, of *the asbestosis the Plaintiff claims?*
>
> YES ___ NO___
>
> 2. Do you believe from the evidence that CSX was negligent, even the slightest, and such negligence was a cause, in whole or in part, of *the toxic encephalopathy the Plaintiff claims?*
>
> YES ___ NO___

(Emphasis added.) Railroad argues that the court erred by consolidating the issue of whether Plaintiff has the diseases in with the question of whether Railroad negligently caused those alleged diseases. This is in contrast to Railroad's proposed verdict form, which begins with the questions, "Do you find from a preponderance of the evidence that the Plaintiff suffers from toxic encephalopathy?" and "Do you find from a preponderance of the evidence that the Plaintiff suffers from asbestosis?" Only then does it proceed to ask about negligence and causation. Railroad contends that the court's approach "effectively and erroneously granted Plaintiff a directed verdict on this issue[.]"

We disagree. The necessary first step in answering the questions posed by the verdict form is to decide whether Employee's claims of disease are proven by the evidence. This necessity is implied by the form's language and by common sense, and nothing in the court's language suggests otherwise. The form does not predetermine the question of whether Em-

ployee has the diseases; it states only that Employee has made a "claim," not that the claim is true. Merriam-Webster defines the verb "to claim" as meaning "to assert especially with conviction and in the face of possible contradiction or doubt." *Webster's Third New International Dictionary* 414 (1993). Railroad certainly did try to contradict the claims. Indeed, in its closing argument, Railroad argued as follows:

> He doesn't have asbestosis, the disease he has sued CSX for, therefore he can't win that part of this case.
>
> Now, you can dispose of the asbestos piece of this case pretty quickly once you get back in the jury room. You elect a foreperson. One thing you can do is say, all right, let's take a vote. Let's take a quick vote. Do we believe Mr. Hensley has asbestosis or not. If all of you say no, then you're done. You can start talking about solvents.

This is just one example. Both parties made clear, throughout the trial and in closing arguments, that whether Employee suffered from the diseases in question was very much a disputed issue. We see no reason to imagine that the jury was confused about the nature of its duty to determine the facts on these crucial issues, especially given how vigorously each side argued them.

In summary, the verdict form states that Employee *claims* to have the diseases in question, and asks the jury to make an overall determination of whether he is entitled to a verdict in his favor on these *claims*. Certainly, the court *could* have broken these questions down into their component parts, but it was not obligated to do so, and its decision to use a

more succinct form did no harm to anyone. If the answer to either question (or both) had been "no," we might have been left wondering whether the jury had concluded that the disease did not exist, or rather that it existed but the Railroad was not responsible for it. But the jury answered "yes," which leaves no doubt about what facts they found. It is implausible to suppose that the jury believed Railroad was the negligent cause of a nonexistent disease. In any event, it is reasonable to assume the jury knew the meaning of the word "claim," and, as such, we find no error here.

V.

In its fourth issue, Railroad argues that Employee's evidence of a compensable "fear of cancer" failed to meet the requirement of *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 157, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003), that it be "genuine and serious," and that the trial court erred by failing to instruct the jury on that standard. We will address the second point first, as it is more easily dispensed with.

The Court in *Ayers* held that a complainant with asbestosis can recover damages under FELA for fear of cancer when that fear "stems from a current injury," *id.* at 159, with the "important reservation" that "[i]t is incumbent upon such a complainant ... to prove that his alleged fear is genuine and serious." *Id.* at 157. However, the Court declined to go further, specifically limiting its holding to the above-stated narrow issue. As the Missouri Court of Appeals explained in *Hedgecorth v. Union Pac. R.R. Co.*, 210 S.W.3d 220, 228-29 (Mo. Ct. App. 2006), "*Ayers* does not require ... instructions detailing or explaining damages based on a fear of developing cancer.... [T]he Court in *Ayers* did not discuss or authorize jury

instructions on this issue, but merely ruled on substantive law." We agree with this analysis of *Ayers*. Railroad does not point us to any other cases containing a requirement that the *Ayers* test or a similar standard be communicated to the jury, nor have we found any. We suspect this is because such a requirement would make little sense.

One purpose of the "genuine and serious" requirement, we believe, is to protect defendants from excessive verdicts based on appeals to jurors' passions with respect to the deeply emotional issue of cancer. Because the mere suggestion of a possibility of cancer has the potential to evoke raw emotions, a juror may be swayed by the barest shred of evidence that a defendant has caused a plaintiff to suffer an increased risk and/or fear of cancer, and may be tempted to overcompensate the plaintiff for such a risk or fear. In light of this reality, little if any purpose would be served by instructing the jury that the plaintiff's fear must be "genuine and serious." Juries do not routinely grant multimillion-dollar awards for injuries that the jurors regard as non-genuine or unserious. Any juror who might be predisposed to grant a large award based on shaky evidence of a fear of cancer is unlikely to be swayed by the language of *Ayers*. Rather, it is for the courts to serve as gatekeepers in this regard, to ensure that fear of cancer claims do not *go* to the jury unless there is credible evidence of a "genuine and serious" fear.

That brings us back to the question of whether Employee introduced sufficient evidence to support a fear of cancer claim under *Ayers*. We find that he did. Railroad does not dispute the well-established link between asbestosis and an increased risk of cancer. However, as Railroad correctly notes, establishing

that increased risk is not enough; Employee must also prove that he had a genuine and serious fear of cancer. On this point, Railroad makes much of Employee's testimony that he has "some concern" over getting cancer "in the back of my mind," like "a little cloud" hanging over his head. Railroad compares this testimony to the evidence in *Seaford v. Norfolk S. Ry. Co.*, 824 N.E.2d 95, 111-12 (Ohio Ct. App. 2004), *rev'd on other grounds*, 106 Ohio St. 3d 430, 835 N.E.2d 717 (Ohio 2005), wherein the plaintiff was denied fear-of-cancer damages under the *Ayers* test because there was no evidence beyond a single, vague statement of "worry" and "concern." However, in the instant case, vague statements of concern do not represent the full extent of Employee's testimony. He also testified that he experiences "anxiety"—a term referenced in *Seaford*, in contrast to mere "worry" and "concern," as part of the dictionary definition of fear: "the general term for the anxiety and agitation felt at the presence of danger." 824 N.E.2d at 112 (quoting *Webster's New World Dictionary*). Employee also testified that he takes Xanax for his anxiety, in part because of his fear of cancer:

> Q: For your anxiety, why did [Dr. Perry] give [Xanax] to you? What kind of anxiety do you have that you have to take medicine for?
>
> A: Well, I just feel like, you know, my chest—I get tightness in my chest and can't—I smother and I sit and worry. I think about—you know, this asbestos in my lungs, it's apt to cause—I don't say I've got it, but it's apt to cause cancer of the lungs.

Railroad asserts that "[t]his testimony ... was subsequently impeached on cross-examination," when Employee testified that he began taking Xanax be-

fore being diagnosed with asbestosis. Yet that fact does not necessarily preclude a jury finding that at least *part* of the reason Employee has *continued* to take Xanax is because of his fear of cancer. Such a finding would be a reasonable inference that a jury could justifiably make from the evidence presented. Similarly, Dr. Perry's testimony that he does not know the cause of Employee's anxiety does not, as a matter of law, establish that no jury could possibly conclude that fear of cancer was one of the causes. Railroad's assertion that "there is no evidence that [Employee's] use of medication was in any way related to a concern about getting cancer" is simply incorrect. Employee's testimony is evidence of that proposition; it is the province of the jury to weigh that evidence against the countervailing evidence, including Railroad's attempts to impeach Employee's testimony. We are not empowered to re-weigh the evidence and substitute our judgment for that of the jury. We simply hold that, if the jury reasonably believed Employee's evidence, it could have found that a genuine and serious fear of cancer existed. That is enough to sustain the verdict.

VI.

Railroad's fifth and final issue-that Employee's closing argument was unduly prejudicial and inflammatory-merits little discussion. Railroad contends that, contrary to FELA's bar on punitive damages, Employee tacitly encouraged the jury to punish Railroad, rather than merely compensating Employee, by making an impermissible "send a message" argument. Having read the transcript of the argument, we agree with Employee that Railroad is taking individual quotes out of context and is painting the argument as far more inflammatory than it

really was. It seems clear to us that Employee's argument was focused on establishing the elements of his claim, and that any rhetorical flourishes were within the boundaries of permissible argumentation. Moreover, we note that the trial court-which, upon hearing the argument first-hand, was in a far better position than we are to assess whether it was prejudicial-found no merit in Railroad's claim that the argument was improper. Such issues are generally left to the trial court's broad discretion. *Doochin v. U.S. Fid. & Guar. Co.*, 854 S.W.2d 109, 115-16 (Tenn. Ct. App. 1993). In any event, we too find this claim to lack merit, and thus decline Railroad's invitation to order a new trial on this basis.

VII.

For all the foregoing reasons, the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, CSX Transportation, Inc. This case is remanded to the trial court for enforcement of the court's judgment and for collection of costs assessed below, all pursuant to applicable law.

OPINION AND ORDER ON PETITION FOR REHEARING

Appellant CSX Transportation, Inc. ("Railroad") has filed a petition for rehearing pursuant to the provisions of Tenn. R. App. P. 39. Railroad argues that this court misstated facts related to our holding that the trial court properly directed a verdict in favor of Thurston Hensley ("Employee") on the statute of limitations issue. We stated in our opinion that "no evidence was presented" linking Employee's headaches to his claimed toxic encephalopathy. Railroad points us to several pieces of evidence that it says we overlooked. Having reviewed Railroad's

memorandum and the accompanying evidence, we conclude that Railroad is correct that we misstated certain facts and conclusions. However, our holding remains unchanged, as will be explained herein. We adhere to our ruling that the directed verdict was properly granted.

To prove that Employee's action is time-barred, Railroad must establish that, prior to January 10, 1999, Employee knew or should have known both of "the critical facts: (1) that he had [the claimed] illnesses,[1] and (2) that they were caused by Railroad." Because there is no evidence that Employee knew he had toxic encephalopathy until he was diagnosed in May 2000, Railroad necessarily relies on the "duty to investigate" rule-*i.e.*, that Employee "should have known" he had encephalopathy because he had sufficient knowledge of existing symptoms to trigger a duty to investigate those symptoms, which investigation would have revealed the full extent of his illness. At issue on this petition for rehearing is whether the evidence of Employee's pre-1999 knowledge of his headaches, coupled with the newly highlighted evidence of an actual symptomatic link between headaches and toxic encephalopathy, creates a fact issue regarding whether Employee's pre-1999 knowledge meets the first prong of the "critical facts" test.[2] If

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[1] The "illnesses" in question are toxic encephalopathy and asbestosis. Railroad's petition for rehearing relates only to encephalopathy. Our conclusions regarding asbestosis are not implicated by the facts and arguments raised by Railroad in the petition and accompanying memorandum.

[2] As to the second prong, we wrote in our opinion that there was no evidence coupling Employee's knowledge of his *non-headache* symptoms with "knowledge sufficient to put him on notice of a connection between *those* symptoms and his work for

the answer is yes, a directed verdict would be inappropriate.

We upheld the trial court's directed verdict on the basis of the following rationale stated by the trial court in a memorandum opinion:

> [Employee's] first symptoms, if I'm not mistaken, were headache[s][3] ... Certainly as I remember the proof, that was not classic symptoms of [toxic encephalopathy]. I don't know that with this big of a disputed and complicated diagnosis that any of us would have known that ... headaches could be a problem. If my recollection of the proof is correct, [and] I stand to be corrected, that's what I'm going to rule on that.

As we noted in our opinion, Railroad did not seek to "correct" the trial court on that point. Moreover, in its briefs on appeal, Railroad stated that Employee's

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Railroad." The resolution of this issue is arguably different, however, with regard to the headaches. Although "mere suspicion of an injury['s] ... probable cause, standing alone," does not satisfy the second prong, *Gay v. Norfolk & W. Ry. Co.*, 253 Va. 212, 483 S.E.2d 216, 217 (Va.1997), the prong may arguably be satisfied by the combination of: a) testimony that Employee suspected his headaches were work-related, and b) testimony that his co-workers urged him to see a "poison doctor" because of the headaches. However, we do not so hold. Rather, we do not decide this issue because the absence of the first prong is dispositive.

[3] The court actually said "headache and bloating." However, Railroad's memorandum in support of its petition for rehearing explicitly concedes, for present purposes, the issue of bloating. Railroad argues that this court erred with regard to headaches only. Thus, for ease of understanding, we have deleted references to bloating—inserting ellipses as needed—in this quotation and several quotations that follow.

"belief of a link" between headaches and solvent exposure was "incorrect." Thus, it appeared to us that Railroad was conceding that headaches are not a symptom of encephalopathy.[4] We deemed this purported lack of a link between the symptom and the illness "crucial" for statute of limitations purposes, "because Railroad's argument relies heavily upon testimony that Employee was urged by fellow employees and by his wife to see a poison 'doctor' for his headaches[.]" Absent that testimony, we held, Railroad could not hope to prove that a duty to investigate arose prior to 1999.

Some language in our opinion appeared to suggest that the purported lack of an evidentiary link between headaches and encephalopathy was itself a dispositive fact. Therefore, Railroad now points us to several items of evidence-originally offered in support of *Employee's* case-that contradict our statement that "[t]here is absolutely no evidence linking his headaches ... to [encephalopathy]." We concede that this was a misstatement. There was indeed evidence in the record linking headaches to encephalopathy. However, this is only a threshold question, not the core issue, and to the extent our opinion suggested otherwise, we erred. The core issue is whether Em-

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[4] Of course, Railroad disputes basically the entire factual underpinning of Employee's case, including the very notion that he has encephalopathy at all-while simultaneously arguing that if, *arguendo*, Employee has encephalopathy, he should have known about it prior to January 10, 1999. Because of these mutually exclusive factual contentions, Railroad at times walks a thin line between conceding points and arguing them in the alternative. For this reason we have chosen not to reject Railroad's argument on the basis of its apparent prior concession of the point, and will proceed to address the substance.

ployee had the requisite knowledge of the claimed illness, *i.e.*, encephalopathy.

It is crucially important to distinguish between Employee's *knowledge of headaches* and his *knowledge* of *encephalopathy*. Headaches are one of many symptoms of encephalopathy, and they are also a symptom of many other conditions. Railroad seizes on our statement that "[i]f Employee were suing for damages caused by his headaches ... his action might well be time-barred; certainly under that scenario a fact issue for the jury would have been created." Railroad suggests that this language means we must now declare that a jury issue has indeed been created, since Railroad has pointed us to evidence of a link between encephalopathy and headaches. But we did not say that evidence of a link between encephalopathy and headaches would create a jury issue. We said that a jury issue would exist "[i]f Employee were suing for damages caused by his headaches"-that is to say, if the fundamental basis of his claim was *headaches*, rather than encephalopathy, a very serious disease of which headaches are but one symptom.

In order to create a jury issue, Railroad must cite material evidence that Employee had, or may be charged with, knowledge of encephalopathy, not merely of headaches."[5] Knowledge of headaches is relevant only if it helps establish that Employee "kn[e]w enough to prompt a deeper inquiry" into the cause of the headaches, *Nemmers v. United States*,

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[5] Concededly, we failed to properly emphasize this distinction when we stated in our opinion that "Railroad's argument fundamentally rests upon the notion that Employee knew or should have known that his headaches... were work-related."

795 F.2d 628, 631 (7th Cir. 1986), and in turn, this "deeper inquiry" is relevant only if it would have revealed the headaches' cause to be encephalopathy. Needless to say, if there was no evidence that the headaches were in fact caused by encephalopathy, then no jury could reasonably conclude that a deeper inquiry would have revealed such a causal link. That was the basis for our original ruling on this point. However, although we now reverse that portion of our ruling, our reversal establishes only that the "deeper inquiry" is *relevant* not that Employee knew enough to prompt it. We now turn our attention to this latter point.

In its memorandum opinion, the trial court stated, "I don't know that with this big of a disputed and complicated diagnosis that any of us would have known that ... headaches could be a problem." The statement goes to the core of the issue. Employee is not suing Railroad for mere headaches; he is suing Railroad for a much broader and more serious illness. Headaches are indeed a symptom of that illness, but they are also a symptom of countless other illnesses. Does the mere fact that a person has a single discrete symptom, such as headaches, trigger such a broad duty to investigate that it starts the clock running on any subsequently discovered illness of which headaches are arguably a symptom-no matter how unforeseeably serious that illness might be? We think not.

The duty to investigate is, as we stated in our opinion, "condition-specific." It follows logically that there must be some reasonable relationship between the symptoms complained of and the condition underlying the cause of action, such that the discovery of the symptoms reasonably places the plaintiff on

notice that he might have a more serious condition which merits further investigation. Indeed, this conclusion is mandated by the "principle that the statute starts to run when a reasonable person would know enough to prompt a deeper inquiry into a potential cause." *Nemmers*, 795 F.2d at 632. No duty to investigate arises if a reasonable person would not, upon experiencing the symptom in question, reasonably suspect that something is seriously wrong that requires further investigation. Thus, the mere fact that an objective link between a symptom and a condition can be retroactively established does not necessarily mean that the discovery of the symptom triggered a duty to investigate as to the condition. For instance, a plaintiff with mild congestion that most reasonable people would dismiss as the likely symptom of a head cold is not necessarily placed on immediate constructive notice that he has a nascent case of severe pneumonia. The symptoms must rise to a certain level of seriousness and apparent relatedness before they trigger a duty to investigate that implicates the subsequently-discovered condition.

This does not mean, of course, that Employee's duty was triggered only when he became aware of every single symptom, or when he knew that those symptoms might mean he had encephalopathy. Such a holding would defeat the purpose of the "duty to investigate" rule altogether. However, again, the condition-specific nature of the duty means there must be some reasonable nexus between the symptoms in question and the ultimate diagnosis at issue. We recognize that headaches-in addition to being symptomatic of countless other conditions, of various levels of seriousness-are a possible symptom of encephalopathy. Yet we agree with the trial court that headaches, by themselves, do not necessarily create

knowledge of encephalopathy, constructive or otherwise. We interpret the court's statement that "with this big of a disputed and complicated diagnosis ... [none] of us would have known that ... headaches could be a problem" as a holding that no reasonable juror could conclude from this evidence that the headaches, standing alone, created a duty to investigate *vis a vis* the toxic encephalopathy. We concur with this holding. It is for this reason that we do not change our judgment in this case.

The petition for rehearing is denied with costs associated with the petition taxed to the appellant, CSX Transportation, Inc.

IT IS SO ORDERED.

CHARLES D. SUSANO, JR., JUDGE

SHARON G. LEE, JUDGE

NORMA MCGEE OGLE, SPECIAL JUDGE

APPENDIX B

November 17, 2008

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

THURSTON HENSLEY

v.

CSX TRANSPORTATION, INC.

Circuit Court for Hamilton County
No. 02C153

No. E2007-00323-SC-R11-CV

ORDER

Upon consideration of the application for permission to appeal of CSX Transportation, Inc., and the record before us, the application is denied.

PER CURIAM

Wade, J., Not Participating
Lee, J., Not Participating

APPENDIX C

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

January 23, 2007

THURSTON HENSLEY,

Plaintiff,

vs.

CSX TRANSPORTATION, INC,

a corporation,

Defendant.

DOCKET NO. 02C153

DIVISION I

MEMORANDUM OPINION AND ORDER

The Court is asked to grant Defendant's Motion for a New Trial and/or to Alter or Amend the Judgment. Defendant, CSXT, has submitted sixteen errors it alleges should render the granting of a new trial.

The Court begins with the first error which Defendant's raise:

1. It was error for the Court to omit all reference to the statute of limitations issue from the jury charge and the verdict form, which action in essence grated directed verdict for Plaintiff on the contested issue of limitations in both the 1) solvent and 2) asbestos counts and this error requires grant of a new trial.

The Court disagrees with Defendant's contention. The Statue of Limitations in a FELA case is three years. The standard is whether a reasonable person knew or should have known with the exercise of reasonable diligence that he or she had been injured and the cause of that injury within that time frame. (*Hayes vs. Norfolk Southern Corp.*, 25 Fed. Appx. 308; 2001 U.S. App. Lexus 27089 (6th Circuit Cir. 2001)).

In this case, the Court finds reasonable minds could not differ on the issue of whether or not Mr. Hensley did not know nor should have known the he was suffering from asbestosis or toxic encephalopathy prior to be diagnosed by Dr. Kelly in May of 2000. (Plaintiff's Appendix A, testimony of Mr. Hensley at page 33) It is uncontroverted from the proof that Mr. Hensley suffered from memory loss, depression and/or anxiety. The Court specifically found that Plaintiff had no reason to believe he had suffered from asbestosis or toxic encephalopathy until he was told so by his treating physicians and that there was no evidence to support a contrary conclusion.

2. The Court should grant a new trial because the verdict form erroneously pre-supposed the Plaintiff, in fact, suffered from toxic encephalopathy and asbestosis.

The jury Verdict Form quite plainly sets out two separate questions for the jury to consider. They were as follows:

1. Do you believe from the evidence that CSX was negligent, even the slightest, and such negligence was a cause, in whole or in part, of the asbestosis the Plaintiff claims?

YES ___ NO ___

2. Do you believe from the evidence that CSX was negligent, even the slightest, and such negligence was a cause, in whole or in part, of the toxic encephalopathy the Plaintiff claims?

YES ___ NO ___

The Defendant, from day one of the trial, denied that there was a scintilla of evidence which found the Defendant to be negligent for causing either of these maladies. Ample competing proof was presented by both parties to prove their case. The issue as is proper in a case of disputed facts was given to the jury in what this Court finds to be succinct and direct questions. The second error cited by the Defendant is overruled.

3. The Court erroneously charged the jury on the Standard of Care to utilize in assessing the negligence of Defendant, CSXT, and then compounded the error by 1) articulating a separate and different Standard of Care for assessment of Plaintiff's negligence, and 2) emphasizing the errors by restating them on the jury verdict form.

This Court relied upon the holding in *Rogers v. Missouri Pacific Railroad Co.*, 352 US 500 (1996) @ p. 448 in charging the jury. Rogers states:

"Under (FELA) the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Counsel for Defendant has supplemented his argument for a new trial by including *Norfolk Southern*

Railway Company v. Timothy Sorrell, a January 10. 2007 U.S. Lexis 1005. A review of the case does not change the Court's opinion as to the appropriateness of the charge. The Court held several jury charge/verdict for conferences with counsel before the charge was communicated to the jury.

4. It was error for the Court to omit CSXT's requested charge on causation, leaving the jury charge devoid of an explanation of causation and that error was compounded by pretermitting causation on the verdict form.

After reviewing the Court's charge on this issue, this Motion is overruled.

5. A new trial is required to correct the error in failing to grant CSXT's motion for directed verdict on the "fear of cancer" allegation and in failing to give CSXT's requested charge.

This Court is confident that the jury instruction as given regarding pain and suffering generally which included any "physical suffering and emotional suffering which he has sustained" is a correct and accurate statement of the law. The charge encompasses whatever fears Mr. Hensley may have had including his fear of cancer. The Court spoke at one of the jury charge conferences that to instruct specifically on the fear of cancer issue would he analogous to instructing the jury in an automobile accident case on pain and suffering and then specifically on the fear of having a broken leg. For these reasons, the Court overrules that error.

6. The Court should have granted a mistrial in reference to the inflammatory and punitively-directed argument of Plaintiff's counsel and, therefore, a new trial is required.

After reviewing both the Defendant's and Plaintiff's Motions and responses thereto for new trial and in the alternative for to alter or amend the judgment, this Court finds that Plaintiff's counsel's argument was not a "send a message" argument. Court found that clearly the argument was not unwarranted, was not made purely for the purpose of appealing to passion, prejudice or sentiment, but accurately reflected *in toto* the proof as had been set out at trial. For those reasons, this issue is overruled.

7. The Court is thirteenth juror should have granted a new trial because the verdict is against the weight of the evidence and clearly excessive.

As thirteenth juror, the Court upholds the jury's verdict. There was overwhelming evidence throughout the proof that Mr. Hensley suffered severe physical and mental deficits because of his permanent and debilitating diseases of asbestosis and toxic encephalopathy. Further, the jury found no comparative fault should be assessed against Mr. Hensley and rendered a verdict totally against the Defendant, CSXT. Mr. Hensley had to resign at age 65 and continues to incur in the past and in the future serious medical expenses.

The Court has considered the five million dollar verdict. As thirteenth juror, the Court finds it to be within the realm of reasonableness given the life expectancy of Mr. Hensley, the seriousness of his illnesses, his pain and suffering, from all of which this Court upholds the verdict.

8. The Court should alter or amend the judgment by granting a remittitur because the judgment is excessive under the proof.

Overruled.

9. A new trial should be granted because of the error in admitting Dr. Edward Baker's testimony concerning studies on which he relied.

The Court finds no "surprise" to CSXT as to Dr. Baker's failure, to bring all of the studies he relied upon to his discovery deposition. The issue could have been remedied pre-trial. Both parties had years to prepare for trial in this cause and therefore that issue is overruled.

10. It was error for the Court to admit the testimony of witness, Larry Elmore, over objection of CSXT thus requiring a new trial.

The Court found the evidence of Mr. Elmore, a CSXT worker, to be relevant and helpful to the jury and therefore his testimony should have been allowed. Defendant's error number 10 is overruled.

11. Admission of the diagnostic opinions of doctors Ed Rodgers and Edward Baker were prejudicial error requiring a new trial.

Though Defendant may not have agreed with the opinions given by these doctors, both were qualified to express medical opinions. The Court's ruling on the pre-trial *McDaniel* Motion hearing is adopted by reference to this order. This issue is overruled.

12. The Court denied CSXT's pre-trial *McDaniel* Motion on science regarding solvent toxic encephalopathy and that denial requires a new trial.

The Court here adopts its previous Memorandum Opinion entered after the *McDaniel* hearing regarding this issue.

13. The admission of Dr. Edward Cook's report of March 30, 2004, was prejudicial error requiring a new trial.

The letter referenced was actually part of the file of CSXT's expert, Dr. Gordon. It was admitted through the cross-examination of the Defendant's expert, Dr. Gordon. Defendant allowed its admission with no objection.

14. The trial court erred in admitting Dr. Truman Perry's diagnosis of asbestosis and solvent toxicity because Plaintiff failed to establish a proper TRE 703 foundation.

The Court found no lack of trustworthiness in the expert opinion proffered by Dr. Perry.

As cited in Plaintiff's response to Defendant's motions at page 33:

> It is well established that a medical doctor, especially a treating physician is an expert capable of giving opinions as to cause, extent and permanency of injuries. *Tennessee Law of Evidence*, (supra) Sec. 7.02 (5) pp. 7-43 to 7-45.
>
> Dr. Perry had the training and education to give an opinion by obtaining his medical degree. He had the experience through his years as a physician treating other persons with asbestos disease, including other railroad workers. Lastly, he had an opportunity to review the medical report of Dr. Michael Kelly which described the occupational history of the Plaintiff.

15. The admission of Plaintiff's Composite "Time Line" Chart as Exhibit 25 was prejudicial error requiring grant of a new trial.

The Court's recollection is that the time line accurately summarized documents which had been allowed into evidence during the trial. Since the defense cites no specific document which was not properly introduced during the trial, the Court overrules this claim of error.

16. A new trial should be granted because trial exhibits 20, 21, 23, 24, 25, 26, 27, 44, 45, 46, 47, 48, 49, 50, 54 and 117 were erroneously admitted.

Because of the numerous documents objected to by the Defendant prior to trial, the Court opted to decide the admissibility of each document as it was attempted to be presented at trial. The Court overrules this last contention of error in that each and every document was considered at the trial in the context of how the evidence was presented and ruled accordingly.

Therefore, from a review of Defendant's, CSX Transportation, Motion for a New Trial, or in the alternative, Motion to Alter or Amend, the attachments to CSXT's Memorandum Brief in Support CSXT's Motion for a New Trial and/or to Alter or Amend the Judgment, Plaintiff's Response thereto, a review of the jury verdict form and consideration of all as thirteenth juror in this trial, the Court, as to each and every issue brought before it to support a Motion for New Trial or in the alternative Motion to Alter or Amend hereby overrules.

Plaintiff has moved for discretionary costs in this cause.

Discretionary costs are by their very name discretionary with the Court. Though Rule 54.04 of the Tennessee Rules of Civil Procedure list certain bills which maybe considered by the Court in determining payment by the opposing side, discretion still lies with the court. For that reason, due to the award of adequate compensatory damages in this cause. The Court fails to grant any discretionary costs to the Plaintiff.

ENTER this 23 day of January, 2007.

/s/ JACQUELINE E. SCHULTEN
JACQUELINE E. SCHULTEN
CIRCUIT COURT JUDGE

APPENDIX D

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

October 2, 2006

THURSTON HENSLEY,

Plaintiff,

vs.

CSX TRANSPORTATION, INC.,

a corporation,

Defendant.

Personal Injury

Fed. Emp. Liab. Act

JURY DEMAND

DOCKET NO. 02C153

DIVISION I

JUDGMENT ORDER

The foregoing case came on to he heard before the Court on September 12, 2006, with the following jury of good and lawful men and women to wit was selected: TERESA STURDIVANT, JENNIFER BIVINS, SEAN BROWN, GEORGE ARTHUR RASHARD BERRY, LETHA KELLY, VIRGINIA. GRAY, CATHY HAINES, COLLEEN WOMACK, YOLANDA MASSEY, C. KAY MCILVEENE, SUSAN LOVING, and alternate jurors, EDITH SLOAN and JACLYN SMITH, all duly qualified, empaneled and sworn according to law and they having heard opening statements by counsel and part of

the proof, the jury was respited until Wednesday, September 13, 2006, at 9:00 a.m.

The case proceeded on Wednesday, September 13, 2006, with the same jury, and having heard additional proof, the jury was respited until Thursday, September 14, 2006. The case proceeded on Thursday, September 14, 2006, with the same jury, and having heard additional proof, the jury was respited until Friday, September 15, 2006. The case proceeded on Friday, September 15, 2006, with the same jury, and having heard additional proof, the jury was respited until Wednesday, September 20, 2006.

The case proceeded on Wednesday, September 20, 2006, with the same jury, and having heard additional proof, the jury was respited until Thursday, September 21, 2006. The case proceeded on Thursday, September 21, 2006, with the same jury, and having heard additional proof, the jury was respited until ariday, September 22, 2006. The case proceeded on Friday, September 22, 2006, with the same jury, and having heard additional proof, the jury was respited until Tuesday, September 26, 2006.

The case proceeded on Tuesday, September 26, 2006, with the same jury, and having heard additional proof, the jury was respited until Wednesday, September 27, 2006. The case proceeded on Wednesday, September 27, 2006, with the same jury, and having heard additional proof, the jury was respited until Thursday, September 28, 2006. The case proceeded on Thursday, September 28, 2006, with the same jury, and having heard all the additional proof, the jury was respited until Friday, September 29, 2006. The case proceeded on Friday, September 29, 2006, with the same jury, and having heard the argument of counsel, received the charge of the Court.

Before the jury began deliberations, the Court excused the alternate juror, Edith Sloan and Jaclyn Smith.

After due consideration thereof, the jury says on their oaths that they find the Defendant, ***CSX Transportation***, was negligent in causing the Plaintiff's asbestosis and toxic encephalopathy claims and awarded the Plaintiff, ***Thurston Hensley***, $5,000,000.00 (five million dollars) for the total amount of damages.

All costs are taxed against the Defendant and surety, for which execution may issue.

ENTER this 2nd day of October, 2006.

/s/JACQUELINE E. SCHULTEN
JACQUELINE E. SCHULTEN
JUDGE

APPENDIX E

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

September 29, 2006

THURSTON HENSLEY,
Plaintiff.
vs.
CSX TRANSPORTATION, INC.,
a corporation,
Defendant.

Personal Injury

Fed. Emp. Liab. Act

JURY DEMAND

DOCKET NO. 02C153

DIVISION I

JURY VERDICT FORM

We, the jury, unanimously answer the questions submitted by the Court as follows:

1. Do you believe from the evidence that CSX was negligence, even the slightest, and such negligence was a cause, in whole or in part, of the asbestosis the Plaintiff claims?

   YES √ NO ___

2. Do you believe from the evidence that CSX was negligent, even the slightest, and such negligence was a cause, in whole or in part, of the toxic encephalopathy the Plaintiff claims?

   YES √ NO ___

If check "NO" to both numbers 1 & 2, please return to the courtroom.

3. Do you believe from the evidence that Mr. Hensley was negligent and such negligence was a cause of his claimed:

   Asbestosis?

   YES ___ NO √

   Toxic encephalopathy?

   YES ___ NO √

4. If you have answered "YES" to number 3, then you must allocate fault between the parties. Place the percentage of fault for each party below.

   Plaintiff, Thurston Hensley ___% (0-100%)

   Defendant, CSX Transportation, Inc. ___% (0-100%)

   Total must = 100%

5. If you answered "YES" to number 1 or 2 above, what total amount of damage you award the Plaintiff in this case? If you find any damages for Mr. Hensley, do no reduce the damages by any percentage of fault.

   $5,000,000

9/29/06 DATE	Colleen G. Womack PRESIDING JUROR PRINTED NAME
	/s/ Colleen G. Womack PRESIDING JUROR PRINTED SIGNATURE

APPENDIX F

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE
AT CHATTANOOGA

THURSTON HENSLEY,

Plaintiff,

vs.

CSX TRANSPORTATION, INC.,
a corporation,

Defendant.

NO. 02C153

DIVISION I

SEPTEMBER 12, 13, 14, 15, 20, 21, 22, 26, 27, 28 and 29, 2006

* * * *

[2730] ELEVENTH DAY OF TRIAL

[2895] * * * *

[THE COURT:] If you decide Mr. Hensley is entitled to damages, you must fix an amount that will reasonably compensate the party for each of the following elements of claimed loss or harm if you find it was suffered by that party and was caused by the act or omission upon which you have made your findings of fact. Each of these elements of damage is separate. You may not duplicate damages for any element by also including the same loss or harm in another element of damage.

If you find Mr. Hensley is entitled to damages, the law simply says he is entitled to full, adequate, and complete compensation for all of the damages,

losses, and injuries he has shown to have been caused by CSX. There are several elements you could consider if Mr. Hensley has proven these elements. Mr. Hensley would be entitled to be compensated for all the reasonable and necessary medical expenses which have been incurred from the date of the injury or injuries through today together with reasonably anticipated medical expenses which will be incurred in the [2896] future, if that has been proven.

Mr. Hensley is also entitled to recover for any loss in his earning capacity. Loss in earning capacity may or may not be the loss of actual earnings. The loss of actual earnings may be an indication of what someone's loss in earning capacity is, but it may not necessarily be the equivalent. The law says that if an injury lessens a person's physical and/or mental ability to earn a living, then that person is entitled to be compensated for that loss reducing the ability to earn.

To determine this, look at such things as the education, skill, and experience that an individual has. Look to the reputation of a person for working and sobriety. In these ways you would determine whether or not this accident or this injury has been caused—has caused a loss in capacity to earn. If the loss is proven Mr. Hensley is entitled to be compensated. Mr. Hensley is entitled to be compensated from the date of the injury to today and in the future. You would consider such things as the nature and extent of the injury itself, whether the injury was temporary in nature, or whether it was [2897] permanent and the degree of permanency, if any.

Mr. Hensley would be entitled to recover separately for any pain and suffering. Pain and suffering is simply what it means. This amount compensates

Mr. Hensley for any physical suffering and emotional suffering which he has sustained.

A decision cannot be based upon mere speculation or conjecture, but Mr. Hensley has no obligation to prove with mathematical certainty such intangible things as pain and suffering or loss of enjoyment of life. This will be for you all to decide. If Mr. Hensley has proved that a loss has, indeed, occurred, then it's your duty to return a verdict for what you feel is a reasonable sum to compensate him.

* * * *

[2904] * * * *

[MR. JORDAN:] We respectfully except to the Court's failure to use the special verdict form that CSX recommended and except to the Court's failure to charge on CSX's Numbers 30, 31, 32, and 33, having to do with fear of cancer. Thank you.

* * * *

APPENDIX G

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE
AT CHATTANOOGA

THURSTON HENSLEY,

Plaintiff,

vs.

CSX TRANSPORTATION, INC.,
a corporation,

Defendant.

NO. 02C153

DIVISION I

SEPTEMBER 12, 13, 14, 15, 20, 21, 22, 26, 27, 28 and 29, 2006

* * * *

[2376] TENTH DAY OF TRIAL

* * * *

[2410] * * * *

MR. JORDAN: I have some points I would like to raise, Your Honor.

THE COURT: On the instructions?

MR. JORDAN: Yes, ma'am.

THE COURT: Okay. Sure.

MR. JORDAN: As Your Honor recalls, we have moved for directed verdict on the fear of cancer and Your Honor has not ruled on that. In the possibility that you deny that motion for directed verdict, we would like the Court to consider some charges on that, which I've shared with counsel.

THE COURT: Okay.

MR. JORDAN: But since we're confident that this will not be an issue, maybe we don't need to raise this.

[2411] MR. SATTERLEY: Well, Your Honor, we've looked over these instructions and we disagree. I've never seen an instruction like this given in a FELA case. Certainly they cite to several products liability cases, asbestos cases. What I believe the law is is the fear of cancer component of this is nothing more--it goes to pain and suffering and it goes to future medical expenses, and it's the component in those two elements of damages which Your Honor has already instructed upon.

THE COURT: Why would I single out a particular alleged injury over any other particular injury? That would be like saying in a car wreck a guy broke his arm and his leg and I talk generally about the arm and then specifically about the leg.

MR. JORDAN: Because the Supreme Court has done that in cases.

THE COURT: Which one?

MR. JORDAN: The U.S. Supreme Court in the Ayers case. They singled out the injury and it says this is a different animal here and it's a part of mental pain and suffering, but, remember, there is a restriction on recovering [2412] here. And they put up a hurdle for the plaintiff's and they said you can recover, but you've got to get over the hurdle of saying it's genuine and serious. And you don't have to show that in a broken arm or a broken leg.

THE COURT: But if I decide not to direct the verdict on the fear of cancer because, for instance, he

had two doctors, whether they were right or wrong, telling him he had asbestosis, doesn't that relieve that hurdle? I mean, the Court has specifically found that it's genuine.

MR. JORDAN: The Supreme Court said that in order to even think about bringing the fear of cancer claim you first have to have asbestosis. Okay. Let's put that over here. He's satisfied that because he has evidence that he has it. But then there's this other hurdle. They said, all right, once you've got asbestosis, now you have to prove that your fear is genuine and serious. So that's where we are.

THE COURT: Well, I agree with you, but what if I rule that I think he felt it was genuine and serious?

MR. JORDAN: Well, you could [2413] certainly rule that way.

THE COURT: But I still have to charge it you think? That's what I'm asking. If I rule against you totally, why would I charge it?

MR. JORDAN: Because it's still a question of fact for the jury to decide if it's genuine and serious.

I think what Your Honor is saying, if I'm hearing you right, you may say I find that there's enough evidence to send it to the jury on whether it's genuine and serious or not, then the jury has to decide. That becomes a fact question at that point. But the problem I have with this whole thing is the Ayers court didn't tell us what genuine and serious is, so we have to do it this way.

THE COURT: Okay. Did you give me Ayers before?

MR. JORDAN: I did a couple of days ago, Your Honor.

MR. SATTERLEY: Your Honor's rationale is right on point. The Supreme Court of the United States did not say you instruct on this. They said that it's an element of the plaintiff's claim. And they said if you have [2414] asbestosis, if, you know, the risk and fear is genuine or serious, it's a matter entitled to relief. And it's a legal issue that certainly the Court can determine based upon the evidence.

And that's not to say that counsel can't argue, argue that the evidence is that this isn't really serious or this isn't really a genuine fear of Mr. Hensley. And that's certainly something that can be fleshed out in the argument, but to put a specific instruction about this very little point, or big point, whatever, is to do exactly what Your Honor is saying. It's like in a car wreck case, if you get a broken back and you're unable to walk and the jury is going to have to think about future complications down the road, courts don't instruct on what are the potential complications down the road, it's for the jury to assess the damages based upon all the evidence. And that's why I think a specific instruction is not needed. Your Honor's rationale is exactly on point.

THE COURT: Well, let me read Ayers. I've got it on my desk and I'll see what they say.* * *

* * * *

[2720] * * * *

Therefore, on the jury charge I pretty much have given you—and Mr. Aden wanted a final version and I couldn't do it because of the comparative fault thing, which affects not only the Jury Verdict Form, of course, but it affects that charge, but I have, therefore, ruled out the following that I've kind of held in abeyance: I believe your charge, Defense, number ten is already included in seven.

Am I going too fast, Mr. Jordan?

MR. JORDAN: No, Your Honor.

[2721] THE COURT: So I'm denying your number ten.

MR. JORDAN: Okay.

THE COURT: And I believe I've already, if I haven't told you, denied your number 11. And, of course, numbers 30, 31, 32 and 33 are as to the fear of cancer, so they would not be included. And, of course, your numbers 15, 16, 17 and 18 as to the statute of limitations also would not be included. And that, I believe, gets me up to snuff on ruling on those.

So—I have read Ayers, of course. Just for the record I'll tell you that. I've also read a brand new opinion. Congratulations, Mr. Aden, you won something yesterday, or Mr. Cardwell did, two days ago in the Court of Appeals, Barbara Haynes on a summary judgment, if you haven't seen it. But I pulled that just to see if it gave me any enlightenment about anything, and it basically is what y'all have already talked about. * * *

* * * *

[2725] * * * *

MR. JORDAN: Your Honor, just for the record, just so I'm clear, our motion for directed verdict on the fear of cancer was deemed renewed and denied?

THE COURT: Correct.

MR. JORDAN: And by not giving the charges on the fear of cancer, I'm not sure what that means.

THE COURT: You know, I misstated that. That's what I get when I go hurriedly through this.

You're absolutely right. I need to relook at those. I wasn't thinking clearly. I was just running through it. So let me pull those back out. I'm sorry. I misspoke.

MR. JORDAN: Thank you, Your Honor.

THE COURT: Thank you for catching that. We all make mistakes.

MR. NICHOL: And I guess just for the record, Your Honor, the Plaintiff does move for a directed verdict on the issue of both the statute [2726] of limitations and on the charge of comparative fault or contributory negligence.

THE COURT: Okay. Are you going to argue any more about that in the morning?

MR. SATTERLEY: In the morning. We know you're late for—

THE COURT: I just want to go ahead and talk. I'm trying to give you as much of the charge as possible tonight so there is no confusion.

What about his 30, 31, 32 and 33 on fear of cancer?

MR. SATTERLEY: We object to those, Your Honor.

THE COURT: I'm shocked. Let me look at them.

Oh, we did talk about this. This is the one where I used the analogy of, you know, if you have injuries and then you say in general and then you go around the broken leg thing or arm, whatever I talked about. Let me look at them again, but—I will probably stand by my ruling, but let me just make sure I haven't messed up.* * *

* * * *

[2730] ELEVENTH DAY OF TRIAL

* * * *

[2740] * * * *

MR. JORDAN: Could I briefly encourage the Court to reconsider what I understand the Court's ruling to be about charging on fear of cancer, specifically our request to charge 30, 31, 32, and 33. There really is nothing in the current charge that addresses that particular claim for damages. I think they need some guidance.

Thank you, Your Honor.

MR. SATTERLEY: We disagree, Your Honor. We object.

THE COURT: I think I have ruled on my, maybe, unfounded feeling, but you know, that's my first feeling in the case. My gut feeling is that it's just a little over the top of what we need to charge. All right. Let me do this and get my secretary started on these. I will be right with you.

* * * *

APPENDIX H

DEFENDANT CSXT'S REQUEST TO CHARGE NO. 30

Standard of Proof—FELA Fear of Cancer for Asbestotic

Plaintiff is also alleging that he suffers from a compensable fear of cancer. In order to recover, Plaintiff must demonstrate first, that he has a reasonable fear of cancer; second, that reasonable fear stems from Plaintiff's asbestos-related disease; and third, that the reasonable fear is genuine and serious. Plaintiff must prove each of these elements by a preponderance of the evidence.

Authority: Norfolk & W. Ry Co. v. Ayers, 123 S. Ct. 1210 (2003); *Triche v. Overnice Transp. Co.*, 1996 U.S. Dist. LEXIS 10168 (E.D. La. 1996); *Devlin v. Johns-Manville Corp.*, 394 A.2d. 495, 499 (N.J. Super. 1985).

* * * *

DEFENDANT CSXT'S REQUEST TO CHARGE NO. 33

Standard of Proof—FELA Fear of Cancer for Asbestotic

In determining whether the Plaintiff has suffered emotional distress resulting from any reasonable fear of developing cancer as a result of his diagnosis of asbestosis, you must determine whether he has demonstrated that his fear is genuine and serious. In order to award damages to the Plaintiff for any emotional distress, you must be persuaded, by a preponderance of the evidence, that his emotional distress is an actual injury.

In making this determination, you may take into account whether or not the Plaintiff has voiced more than a general concern about his future health, whether or not he has suffered from insomnia or other stress-related conditions, whether or not he has sought psychiatric or medical attention for his symptoms, whether he has consulted counselors or ministers concerning his fear, whether he has demonstrated any physical symptoms as a result of his fear, and whether he has produced witnesses who can corroborate his fear.

Unless you determine that his fear is genuine and serious, and he has suffered actual emotional injury as a result of this fear, you cannot find for the Plaintiff on that particular issue of damages.

Authority: *Norfolk & W. Ry Co. v. Ayers*, 123 S. Ct. 1210 (2003); *Carey v. Piphus*, 435 U.S. 247 (1977); *Smith v. ACandS, Inc.*, 843 F.2d 854, 859 (5th Cir. 1988); *Vadie v. Miss, State Univ.*, 218 F.3d 365, 376, n. 26 (5th Cir. 2000); *Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 531 (8th Cir. 1999); *Price v. Charlotte*, 93 F.3d 1241, 1251-1252 (4th Cir. 1996); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938, n. 11 (5th Cir. 1996); *Turic v. Holland Hospitality*, 85 F.3d 1211, 1215-16 (6th Cir. 1996); *DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1305 (7th Cir. 1990); *DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992).

APPENDIX I

Section 1 of the Federal Employer's Liability Act, 45 U.S.C. § 51, provides as follows:

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by

such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

APPENDIX J

JEFFERSON COUNTY, KENTUCKY
CIRCUIT COURT

DIVISION FOUR (4)

NO. 04-CI-01538

ROBERT MONTGOMERY,

PLAINTIFF,

v.

CSX TRANSPORTATION, INC.,

DEFENDANT.

March 26, 2008

JURY INSTRUCTIONS

* * * *

[3] * * * *

As part of Plaintiff's pain and suffering claim, he made a claim for fear of contracting asbestos related cancer. In order to recover for this fear, Plaintiff must demonstrate first that he has a [4] reasonable, genuine and serious fear of cancer and, second that this fear stems from Plaintiff's asbestos-related disease and not from other sources.

* * * *

3/26/08 /s/Illegible
JUDGE

APPENDIX K

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GARY JARVIS,
THOMAS SATAVA, and
RAYMOND ZWOLENIK,

Plaintiffs,

vs.

CONSOLIDATED RAIL
CORPORATION, et al.,

Defendants.

Case Nos.
CV 417083
CV 417084
CV 420685

CA 03 083244

JUNE 23, 2003

TRANSCRIPT OF
TRIAL PROCEEDINGS

BEFORE THE HONORABLE
HARRY A. HANNA

CUYAHOGA COUNTY COURTHOUSE

COURTROOM NO. 4B

LAKESIDE AVENUE,
CLEVELAND, OHIO

* * * *

[1167] * * * *

There has also been a claim by each man for fear of cancer. Plaintiffs are entitled to damages for their

current injury which they allege—may be entitled to damages for their current injury which encompasses a genuine and serious present fear that the toxic exposure that caused the asbestosis may later result in cancer.

Accordingly, if you believe that any of these three plaintiffs currently suffers from asbestosis and that he has be genuine and serious present fear that that asbestosis or the factors that caused it may later result in cancer, you can award money damages for that fear.

* * * *

APPENDIX L

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA

CIVIL TRIAL DIVISION

ROGER ALFMAN

VS.

CONSOLIDATED RAIL CORPORATION

MARCH TERM, 2002

NO. 0214

JURY TRIAL

DAY V

March 2, 2007

Courtroom 654, City Hall

Philadelphia, Pennsylvania

BEFORE: THE HONORABLE FREDERICA
MASSIAH-JACKSON, J.

---

* * * *

[77] * * * *

If you find that Mr. Alfman has an asbestos related disease, then you may compensate him for his reasonable fear of cancer as an element of his asbestosis related pain and suffering damages, if you find that his fear is genuine and serious. The question of whether the plaintiff's fear of cancer is reasonable is for you, the jury, to decide.

* * * *

OPPOSITION BRIEF

123

(5)

No. 08-1034

FILED
MAR 16 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

THURSTON HENSLEY,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

H. DOUGLAS NICHOL
Counsel of Record
NICHOL & ASSOCIATES
6759 Baum Drive
Knoxville, Tennessee 37919
(865) 588-7465

And

JOSEPH D. SATTERLEY
KENNETH L. SALES
PAUL J. KELLEY
RICK A. JOHNSON
SALES, TILLMAN, WALLBAUM,
CATLETT & SATTERLEY, PLLC
1900 Waterfront Plaza
325 W. Main Street
Louisville, Kentucky 40202

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether in a case under the Federal Employers Liability Act (FELA), the Trial Court was correct in refusing to use the complex and confusing proposed jury instructions submitted by Petitioner on fear of cancer and in utilizing instead the well established Tennessee jury charge on pain and suffering.

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STATEMENT OF THE CASE

Petitioner, CSX Transportation Inc. (CSX), correctly states the underlying history of the case and the basis of the action filed by the Respondent, Thurston Hensley (Mr. Hensley). However, Mr. Hensley disputes the recitation of facts as characterized by CSX. CSX seeks to characterize this case as a significant verdict awarded for a minor asbestos-related disease. In reality, this case was predominately a toxic brain injury case and the overwhelming evidence addressed the brain injury. The opinion of the Tennessee Court of Appeals completely, accurately, and clearly articulates the facts and the findings which justify the affirming of the Trial Court's judgment.

CSX's recitation of facts in its petition omits relevant factual evidence and misrepresents others by taking quotes of testimony and statements of counsel out of context. CSX fails to acknowledge the verdict control devices it utilized in testing the sufficiency of the evidence. More importantly, CSX does not mention the verdict control devices it failed to utilize and therefore waived.

CSX attempts to minimize the injuries and damages sustained by Mr. Hensley. This case involved two serious and permanent injuries: toxic encephalopathy and asbestosis. The evidence showed that Mr. Hensley's brain injury resulted in chronic memory loss, loss of cognitive functioning, shrinkage

of the brain, central nervous system damage, dementia, depression, and anxiety.

The evidence further showed as a result of contracting asbestosis, Mr. Hensley had chronic shortness of breath, chronic coughing, and anxiety due to his fear of cancer.

The jury found that both conditions were caused by the negligence of CSX. This case involved much more than a "fear-of-cancer" claim.

The Tennessee courts accurately applied *Norfolk & W. Ry v. Ayers*, 538 U.S. 135 (2003). CSX failed to avail itself of two of the verdict control devices provided by Tennessee law and as specified by this Court in *Ayers*. CSX failed to request or submit special jury interrogatories regarding fear of cancer on the verdict form. CSX further failed to perfect on appeal any claim that the verdict was excessive. CSX now relies on the two complex and confusing requested jury instructions that it requested. Neither of these requested instructions was required under this Court's decision in *Ayers*.

There is no reason for this Court to grant review of this case.

I. Mr. Hensley's Employment and Exposures

In September 1971, Mr. Hensley began a thirty-three-year career with the L&N railroad (now CSX). He hired in as an electrician apprentice and after seven months became a journeyman, doing electrical

work and repairing locomotives in the diesel shop. Trial Tr. 1333.

Mr. Hensley was employed as an electrician at the railroad shops at Corbin, Kentucky, initially at the "old" shop and beginning around 1986 at the "new" shop. Trial Tr. 1344.

A. Solvent Exposure

Mr. Hensley's exposure to DowClene solvents began the first day he worked for the railroad. Mr. Hensley as an electrician was required to use DowClene to wash engines and electrical motors. DowClene was effective in washing away the moisture and oil around the high voltage grounds necessary in keeping the locomotive engines operational. Trial Tr. 1337. It came in 55-gallon drums which were black and had no labels on them. Trial Tr. 1343. However, DowClene was a highly volatile brain toxin.

Mr. Hensley would use DowClene in a variety of ways. He would take the covers off the traction motors of the engines and spray on this solvent with a high pressure hose. It took approximately thirty (Trial Tr. 30) minutes to spray each traction motor and the solvent would drain into troughs. Many times these troughs would "stop up" and the electricians were forced to stand and walk in the pools of DowClene the whole time they were spraying. Trial Tr. 1344. Many times Mr. Hensley worked in the "pits" under the engines where the exposures were worse due to lack of air circulation. Trial Tr. 1320.

Mr. Hensley used this DowClene solvent on a daily basis throughout the 1970's and into the 1980's at the "old shop." Trial Tr. 1343. In addition to spraying it, he used it as a cleaning agent, washing out coats and gloves. Trial Tr. 1348-1349.

The fumes from the solvents were described as being so heavy that the workers would get "drunk" on it. Indeed, at times Mr. Hensley would have to crawl out from under the engines and hold onto steel posts until he could "get straightened out and go get fresh air." Trial Tr. 1350-1351.

When Mr. Hensley and his co-workers asked about the fumes, they were told by the foreman to go out and take an "air break" and they would be alright. Trial Tr. 1351. During these exposures no one at the railroad, or otherwise, ever told Mr. Hensley there was any danger from the DowClene solvent fumes. Trial Tr. 1351. CSX never provided Mr. Hensley with any protective equipment to keep him from being exposed to these volatile solvents. Trial Tr. 1353.

B. Asbestos Exposure

As an electrician, Mr. Hensley worked on hundreds of brake grids containing 53% asbestos. When the braking grids overheated they had to be "switched out" by the electricians. They got hot and melted, causing the asbestos to fall off in chunks and powder. After unbolting the framing, Mr. Hensley used an air hose and blew out the grids. Mr. Hensley described

the dust conditions: "And the dust would be flying. It will just cover the shop area. . . . " Trial Tr. 1354.

In addition to the dust from the braking grids, there were asbestos-lined pipes in the boiler room where CSX required the electricians to work. Trial Tr. 1356. The steam lines in the shop were covered in asbestos. At times this covering had to be torn off by the pipefitters. Mr. Hensley was working on the engines next to them and dust could be seen coming off the pipes. Trial Tr. 1356.

CSX never told Mr. Hensley he was breathing asbestos, nor that the dust was dangerous. Trial Tr. 1372. He was never told to use a mask or a respirator to protect himself. Trial Tr. 1355.

II. Mr. Hensley's Injuries

In the 1970's, Mr. Hensley began noticing he was short of breath. He began to experience headaches and developed problems concentrating. Trial Tr. 1396. He scheduled an appointment on May 24, 2000, with Dr. Michael Kelly, a board certified internist and occupational medicine specialist in Lansing, Michigan. Dr. Kelly was the first doctor who told Mr. Hensley that he had toxic encephalopathy and asbestosis.

A. Toxic Encephalopathy

Toxic encephalopathy is permanent brain damage for which there is no cure. It is caused by toxins

infiltrating the brain tissues which causes damage and interferes with brain function. Trial Tr. 279. Toxic encephalopathy causes a wide range of devastating cognitive deficits such as memory loss, concentration problems, fatigue, depression, and anxiety. Some therapies can be instituted and medications can help with some of the adverse health effects of toxic encephalopathy, but the deficits and the damaged brain tissue is irreversible. Trial Tr. 282.

Dr. Kelly expressed the opinion that Mr. Hensley's brain damage was caused by the solvent exposure he experienced at the railroad. Trial Tr. 279. The symptoms Mr. Hensley experienced were memory loss, concentration difficulties, and anxiety. He further had problems thinking and processing information. Dr. Kelly's examination revealed signs of central nervous system impairment. Trial Tr. 279-280. Mr. Hensley's history of getting "high" and dizzy while using the solvents indicated that he was experiencing acute toxicity. An MRI showed a significant amount of brain shrinkage and loss of brain tissue. Trial Tr. 280. Based on the physical findings, cognitive findings, exposure history, EEG, and MRI results, Dr. Kelly diagnosed Mr. Hensley with solvent-induced toxic encephalopathy. Trial Tr. 376. Dr. Truman Perry, Mr. Hensley's primary care physician, agreed with Dr. Kelly's diagnosis of chemical-induced toxic encephalopathy. Trial Tr. 1319.

Mr. Hensley was seen by Dr. Ed Cook on referral from Dr. Kelly, for a neuropsychological evaluation. This evaluation showed specific areas of brain

impairment. Trial Tr. 398. Dr. Cook's report stated that Mr. Hensley's cognitive impairment "was one of the worst that I had encountered in my 19 years of clinical practice." He further found that these cognitive deficits were caused by the solvent exposure and had resulted in deficits in five of seven areas. Because of these problems, Dr. Cook expressed the opinion that Mr. Hensley's safety in driving and using power tools was questionable. He opined that these cognitive and memory deficits had become chronic and dementia had been found due to Mr. Hensley's overexposure to the solvents. T. R. Vol. 6, Exhibit 105.

Mr. Hensley was seen by Dr. Dennis Sprague, a licensed psychologist, who performed additional neuropsychological testing. Dr. Sprague found Mr. Hensley to be suffering from moderate depression and anxiety. He had attention and concentration deficits and suffered from short-term memory problems. From this testing, Mr. Hensley showed significant to moderate brain impairments consistent with those found in toxic encephalopathy. Trial Tr. 777. Dr. Sprague stated that Mr. Hensley would need future counseling and psychotherapy including medications. Trial Tr. 775.

Dr. Edward Baker has held positions at Harvard School of Public Health and the Center for Disease Control (specifically the National Institute for Occupational Safety and Health (NIOSH)). Dr. Baker evaluated Mr. Hensley's medical records and confirmed that he had chronic toxic encephalopathy caused by his exposure to solvents at the railroad,

causing memory and concentration problems that have disabled him from work. Trial Tr. 836-837. Likewise, Dr. George Rodgers, a medical toxicologist from the University of Louisville, testified that Mr. Hensley suffers from solvent-induced encephalopathy. Trial Tr. 420.

Thurston Hensley was totally disabled from working as the result of suffering from chronic brain damage. Trial Tr. 836-837; Trial Tr. 1317; Trial Tr. 1321.

B. Asbestosis

Asbestosis is a chronic pulmonary condition caused by the inhalation of asbestos fibers. The fibers cause an inflammation leading to scarring of the lungs. It takes a very long time to develop and is a permanent condition. Unfortunately, it tends to be progressive, so the loss of lung function worsens over time. Trial Tr. 283. Dr. Kelly found that Mr. Hensley had abnormalities on his chest x-ray, impairments in his pulmonary function testing along with symptoms of chronic coughing, and shortness of breath. Consistent with these physical findings, Dr. Kelly found Mr. Hensley had sufficient exposures to asbestos at the railroad to diagnose asbestosis.

The asbestosis and the toxic encephalopathy that Mr. Hensley suffers impairs his day-to-day living. Because of the inability to take a deep breath, Mr. Hensley runs out of air quicker. From a functional standpoint, Mr. Hensley is much more physically

limited. Trial Tr. 289. Mr. Hensley began to forget people's names, telephone numbers, and he would forget to fill out repair forms. Trial Tr. 1364-1365. Finally, he could no longer work five days straight and did not want to get a bad record with CSX, so he decided to retire at age 65. Trial Tr. 1366.

Mr. Hensley was earning $40,000 a year at the time of his retirement and he had hoped to work to age 70. Before he had to take the desk job because of his breathing, he was making around $60,000 a year with overtime. Trial Tr. 1385.

Mr. Hensley remains under the care of his family physicians and is prescribed inhalers and a nebulizer for his breathing. He has been given a cane and walker and a prescription for Xanax for his anxiety to help him function. Trial Tr. 1368.

III. Mr. Hensley's Fear of Cancer

This Court in *Ayers*, recognized the relationship between asbestosis victims and their increased risks of developing lung and mesothelioma cancers.

Mr. Hensley produced testimony from expert witnesses, Dr. Michael Kelly and Dr. Michael Ellenbecker on the increased risk of developing cancers from asbestos exposure. Mr. Hensley was told of these risks and testified as to how it affected him and his resulting fear.

CSX belittles that fear by misrepresenting Mr. Hensley's testimony on the matter. CSX would have

this Court believe that Mr. Hensley merely thought about cancer and kept it in the back of his mind, and he was not really afraid of getting cancer. Interestingly, CSX omitted from its petition Mr. Hensley's following testimony:

> Q: For your anxiety, why did he [Dr. Perry] give it to you? What kind of anxiety do you have that you have to take that medicine for?
>
> A: Well, I just feel like, you know, my chest – I get tightness in my chest and can't – I smother and I sit and worry. I think about – you know, this asbestos in my lungs, it's apt to cause – I don't say I've got it, but it's apt to cause cancer of the lungs.
>
> Also if you've got asbestos in your lungs, you've got it in your intestines and it causes polyps. Dr. Kelly told me that asbestos causes polyps and the polyps is what brings the cancer on and I've got that. Those different problems. You know, you can't help but think when they give you diagnosis of things that could kill you, you can't help but think of it. And that brings anxiety on.

T.R. at 1369.

> Q: Now, a couple of things, and we'll at least take a break, but you have never been told by any physician that you have cancer? No doctor has told you that?

A: Not saying I have cancer. They said I'm a likely prospect for it.

Q: And you have some concern about the future?

A: Yes.

(T.R. 1462).

Mr. Hensley specifically testified that he had anxiety over the prospect that he could develop cancer as a result of his asbestos exposure and diagnosis of asbestosis. These fears were justified and corroborated by Dr. Kelly, who testified:

Q: Doctor, do you have an opinion within a reasonable degree of medical certainty as a result of Mr. Hensley contracting this disease, asbestosis, whether he has an increased risk of cancer?

A: I do have an opinion.

Q: What are those opinions?

A: Well, he does have an increased risk for developing lung cancer. Individuals with asbestos exposure such as he have – has had have a much higher rate of lung cancer development, and it is something that he'll have greater risks to develop.

Q: Are there other type of cancers associated with asbestos?

A: There are. Colon and gastrointestinal cancers certainly. There are some lymphomas and hematopoietic type cancers

that can occur more frequently. Those certainly are the most common of the cancers that would affect him.

Q: Do you have an opinion within a reasonable degree of medical certainty as to whether or not Mr. Hensley is at an increased risk of developing those types of cancers because of his asbestosis?

A: I do have an opinion.

Q: What is that opinion?

A: He is at an increased risk for developing those kinds of cancers.

T.R. 290-291.

Dr. Kelly further testified about the cancer risks associated with asbestos disease and the understandable impact the illness has on one's outlook on life. He stated that because of these risks, Mr. Hensley requires regular and recurring medical evaluations for his own general well-being. Mr. Hensley should get pulmonary function studies yearly, recurrent CT scans of the lungs, as well as regular evaluations. T.R. 290.

More telling is the fact that CSX did not produce any witnesses who disputed the real and serious increased risk of cancers in asbestosis victims. Nor did it cross exam Mr. Hensley's experts on the issue. In its closing arguments, CSX did not dispute or even comment on Mr. Hensley's fear-of-cancer claim.

From this evidence, the jury found, on the special verdict form, that Mr. Hensley suffered from both

asbestosis and toxic encephalopathy caused by his employment with CSX railroad. The evidence showed Mr. Hensley experienced physical injuries, with physical and mental pain caused by both diseases. Despite CSX's contentions, the great weight of the evidence supported the jury's verdict.

REASONS FOR DENYING THE WRIT

I. CSX Transportation, Inc. Does Not Raise Any Issue Of First Impression Or Any Issue of Such Extraordinary Importance As To Justify A Review By The Supreme Court

In its labored attempt to draw this case within the ambit of *Ayers*, CSX misstates this Court's holding in *Ayers*. CSX incorrectly contends that this Court held in *Ayers* "that, under the Federal Employers' Liability Act, 45 U.S.C. §51-60, a plaintiff may 'seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages,' with the 'important' qualification that the plaintiff must 'prove that his alleged fear is genuine and serious.'"[1] In fact, *Ayers* held "that mental anguish damages resulting from the fear of developing cancer may be recovered under FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposures to asbestos." 538 U.S. at 141.

[1] Petition For A Writ Of Certiorari, pp. i and 2.

Further, CSX's attempt to require the modifiers "genuine" and "serious" as limitations on Mr. Hensley's claim for damages for mental anguish ignores the fact that in *Ayers* these limiting modifiers were only applied to claims where there has not been "proof of physical manifestations of the claimed emotional distress." 538 U.S. at 157. In the case *sub judice*, Mr. Hensley suffered from physical manifestations from his mental anguish, clearly placing his claim outside any requirement that the jury be specifically instructed that his fear of cancer is genuine and serious. The Tennessee Trial Court properly instructed the jury consistent with *Denton v. Southern Railway Co.*, 854 S.W.2d 885, 888-889 (Tenn. Ct. App. 1993), which correctly applied *Rogers v. Mo. Pacific R.R. Co.*, 352 U.S. 500, 506 (1957); *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 120-21 (1963); and many other cases from this Court.

Even if CSX's interpretation of *Ayers* is applied to the case *sub judice*, CSX's petition still lacks merit, as is explained in the following Section II.

II. The Tennessee Courts Below Faithfully Applied *Norfolk v. Ayers* And Their Decisions Are Consistent With This Court's and Other Courts' Application Of FELA

A. The Tennessee Court of Appeals was correct in holding that the Trial Court properly instructed the jury on the fear-of-cancer claim

This case was tried after *Ayers* and the Trial Court properly performed its role as gatekeeper to ensure that sufficient evidence existed to allow the issue of "fear of cancer" to be considered. Pretrial, CSX used motions *in limine* and motions for summary judgment to test the sufficiency of Mr. Hensley's claims. At trial, CSX requested a directed verdict at the end of Mr. Hensley's proof and at the conclusion of all proof to exclude any fear-of-cancer claim. Post trial, in its motion for new trial or in the alternative to alter the verdict, CSX had an opportunity to argue the sufficiency of the evidence on fear of cancer. In each instance, the Trial Court considered the arguments and evidence and correctly denied those attempts.

CSX argued its interpretation of *Ayers* before the Tennessee Court of Appeals; and the Court in applying *Ayers,* as argued by CSX, correctly held that the purpose of the "genuine" and "serious" requirement is to protect defendants from excessive verdicts. It noted the courts must serve as gatekeepers to ensure that fear-of-cancer claims do not go the jury unless there is credible evidence that the fear is "genuine and serious."

The Court of Appeals also reviewed the record and concluded that the evidence was sufficient for a jury to reasonably believe that a genuine and serious fear of cancer existed.

CSX has not cited any authority to show that any court, federal or state, has held that where there is a physical manifestation of the emotional distress caused by the fear of cancer that a "genuine and serious" limiting instruction must be given. To the contrary, courts have held that such an instruction is not warranted. *Hedgecorth v. Union Pacific R.R. Co.*, 210 S.W.3d 220, 227 (E. D. Mo. 2007), *cert. denied*, 128 S.Ct. 59, 169 L.Ed.2d 15 (2007). *See, also, Jones v. CSX Transp.*, 337 F.3d 1316, 1317 (11th Cir. 2003), where the Eleventh Circuit Court of Appeals, following *Ayers*, reversed the district court's ruling that there must be objective manifestation of emotional distress before there can be a recovery for fear of cancer.

B. The Requested Charges Submitted by CSX Were Not Accurate Under Tennessee or FELA Law and the Trial Court Was Correct In Not Using Them.

The charge given to the jury was an accurate and complete instruction. (Appendix A) On the issue of mental anguish, the charge was consistent with the approved Tennessee Pattern Jury Instructions, Civil Third Edition, §14.10. (Appendix B) The Trial Court charged in part:

> In this action, Mr. Hensley has the burden of establishing by a preponderance of the evidence all the facts necessary to prove the following issues: Was CSX negligent, even in the slightest; and did that negligence cause injury to Mr. Hensley; and what damages, if any, is he entitled too. . . . Trial Tr. 2889.
>
> Mr. Hensley would be entitled to recover separately for any pain and suffering. Pain and suffering is simply what it means. This amount compensates Mr. Hensley for any physical suffering and emotional suffering which he has sustained. A decision cannot be based upon mere speculation or conjecture, but Mr. Hensley has no obligation to prove with mathematical certainty such intangible things as pain and suffering or loss of enjoyment of life. This will be for you all to decide. If Mr. Hensley has proved that a loss has, indeed occurred, then it's your duty to return a verdict for what you feel is a reasonable sum to compensate him. Trial Tr. 2897.

The case *sub judice* is not a stand-alone claim for negligently inflicted emotional distress. Mr. Hensley has asbestosis, a cognizable injury under the FELA. *Urie v. Thompson,* 337 U.S. 163, 167 (1949). Furthermore, this Court recognizes that pain and suffering damages may include compensation for fear of cancer when that fear "accompanies a physical injury." *Metro-North Commuter R. Co. v. Buckley,* 521 U.S. 42 (1997). Mr. Hensley is not "symptom free." He has physical manifestations of asbestosis; shortness of breath and chronic cough.

The Tennessee Pattern Jury Instruction on personal injury and pain and suffering (Appendix A) and the charge given by the Trial Court in this case (Appendix B) are consistent with the Restatement (Second) of Torts §456 cited by the Court in *Ayers* (358 U.S. at 148).

The requested jury charges submitted by CSX were confusing, used terms not defined, and were duplicative of other items in the jury instruction. (Petitioner's Appendix H) CSX's Request No. 30 used terms such as "alleging," "must demonstrate," and "stems," which are not terms otherwise defined and are inconsistent with the jury charge in general. This request further duplicates the charge that a plaintiff must again prove each element by a preponderance of the evidence.

CSX's Request No. 33 is even worse. Again, using terms and phrases which are confusing and inconsistent: "determining," "must determine," "you must be persuaded," "emotional distress is an actual injury," "making this determination," "take into account," and "Plaintiff has voiced." Furthermore, CSX attempted to inject qualifiers for recovery such as whether the Mr. Hensley "suffered from insomnia," "sought psychiatric or medical attention," "whether he has consulted counselors or ministers," "whether he has demonstrated any physical symptoms as a result of his fear," and "whether he has produced witnesses who can corroborate his fear." Rather than a simple charge, easily understood by the jury and consistent with the instructions in general, CSX's requests

would do nothing but confuse the jury. CSX misinterprets the holding of *Ayers* to require when there is no physical manifestation of the emotional distress, that the fear must not only be genuine and serious but the jury must "determine" he has "suffered actual emotional injury as a result of his fear."

This Court in *Ayers* never sanctioned such confusing and conflicting language in the jury charge. No appellate decision has been found that approves such requests as submitted in the case *sub judice*. The trial court jury charges attached as appendices to CSX's petition do not contain the excess and confusing verbiage that CSX now attempts to legitimate. (Petitioner's Appendices J, K, and L)

As noted above, this case involved several items of damages from two distinct diseases: asbestosis and toxic encephalopathy. The evidence showed that Mr. Hensley suffered physical pain and suffering, as well as mental anguish from both diseases. In a jury charge it makes no common sense to single out one particular item (fear of cancer) for the addition of the qualifiers (serious and genuine) and to ignore the other items of damages. All damages were shown to be serious and genuine, otherwise the jury would not have returned the amount of its verdict.

III. There Were Adequate Verdict Control Devices Either Utilized Or Waived By CSX

As mentioned above, CSX utilized various "verdict control devices" as outlined by the Court in *Ayers*. It failed to utilize two others.

The jury was requested to return a general verdict. CSX could have requested a special verdict or special interrogatory asking the jury to separate any fear-of-cancer damages. Tennessee Rules of Civil Procedure, Rule 49.

The Court in *Ayers,* faced with the identical situation, found it impossible to look behind judgments to determine the amount the jury awarded for any particular element of damages. (538 U.S. at 144) CSX now complains that the jury verdict is "staggering" and "massive." However, following the denial of its post-trial motions, including a request for a remittitur, CSX failed to appeal the denial of remittitur or otherwise to challenge the verdict amount in the Court of Appeals. When questioned in oral argument in the Tennessee Court of Appeals, counsel for CSX was asked:

Justice Lee:	"I take it from reading the briefs, you all are not challenging the amount of this verdict; is that correct?"
Counsel for CSX:	"We are not. We forgot." (Appendix C)

Tennessee law specifically authorizes both a trial court and the court of appeals to grant a remittitur if the verdict is excessive or beyond the range of reasonableness. Tenn. Code Ann. §20-10-102, Remittitur. *Palanki ex rel. v. Vanderbilt Univ.*, 215 S.W.3d 380 (Tenn. Ct. App. 2006). However, it must be designated for appeal to be heard by the Court of Appeals. Tennessee Rules of Appellate Procedure, Rule 13. Scope of Review.

CSX failed to appeal the amount of the verdict, and consequently waived that issue. CSX is disingenuous in attempting to raise that issue now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

H. DOUGLAS NICHOL
Counsel of Record
NICHOL & ASSOCIATES
6759 Baum Drive
Knoxville, Tennessee 37919
(865) 588-7465

And

JOSEPH D. SATTERLEY
KENNETH L. SALES
PAUL J. KELLEY
RICK A. JOHNSON
SALES, TILLMAN, WALLBAUM,
CATLETT & SATTERLEY, PLLC
1900 Waterfront Plaza
325 W. Main Street
Louisville, Kentucky 40202

Counsel for Respondent

APPENDIX A

IN THE CIRCUIT COURT OF
HAMILTON COUNTY, TENNESSEE

AT CHATTANOOGA

THURSTON HENSLEY, Plaintiff, vs. CSX TRANSPORTATION, INC., a corporation, Defendant.	)	NO. 02C153 DIVISION I

SEPTEMBER 12, 13, 14, 15, 20,
21, 22, 26, 27, 28 and 29, 2006

VOLUME 20 Of 20

(Filed Jul. 10, 2007)

* * *

[2881] Appreciate your attention. Your Honor, I appreciate your patience.

THE COURT: Thank you ladies and gentlemen. What is your preference? Should we take a lunch break and come back and have me read you the charge? It's probably a good idea if we had a short lunch break. I really want you to pay attention to it, so drink coffee at lunch; okay? Stand for the jury.

(Thereupon, the jury left the courtroom at 12:40 p.m.)

(Thereupon, the jury entered the courtroom at 1:30 p.m., and the following proceedings were had in open court:)

JURY CHARGE

THE COURT: All right, ladies and gentlemen, I hope you all enjoyed your quick lunch. I appreciate your getting back. I know you're anxious to get to deciding this case.

Now that you have heard all of the lawyers and arguments and proof in this trial, it's my duty to instruct you on the law as it applies in this case. It's your duty to find the facts from all the evidence in the case. After you determine what the facts are, you must apply [2882] the law that has been given to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, prejudice, or sympathy.

You must decide the case solely on the evidence before you in accordance with the law as given to you. All the instructions are equally important. The order in which these instructions are given has no significance. You must follow all of the instructions and not single out some and ignore others.

In reaching your verdict you can consider only the evidence that was admitted. Remember that any questions, objections, statements or arguments made by the attorneys during the trial are not evidence. If the attorneys have stipulated or agreed to any fact,

however, you can regard that as having been proved. The testimony you've been instructed to disregard is not evidence and must not be considered. You are to decide the case solely on the evidence as received at trial. Although you must consider only the evidence in this case in reaching your verdict, you're not required to set aside your common knowledge. You are permitted to [2883] Weigh the evidence in the light of your common sense, observations, and your experience.

The fact that a corporation is a party must not influence you in your deliberations or in your verdict. Corporations and persons are equal in the eyes of the law. Both are entitled to the same fair and impartial treatment and to justice by the same legal standards. There is no evidence before you that any party has or does not have insurance. Whether or not insurance exists has no bearing upon any issue in this case. You may not discuss insurance or speculate about insurance based upon your general knowledge.

You are to decide the case only from the evidence presented at trial. That evidence consisted of the sworn testimony of witnesses who testified both in person and by deposition, the exhibits that were received and marked as evidence, and any facts to which the lawyers have stipulated or agreed.

As I told you at the beginning of the trial, there are two types of evidence, direct and circumstantial evidence. Direct evidence is direct proof of a fact such as testimony of a witness about what the witness personally [2884] observed. Circumstantial evidence

is indirect evidence or evidence that gives you clues about what may have happened. You'll recall the analogy I gave you. If a person comes into the courtroom, takes the stand, and says it's raining outside, assuming you believe that person, it should be raining outside. If a person walks into the back of the courtroom and stands there dripping wet with an umbrella, you could assume circumstantially that either somebody threw a bucket of water on him or it's raining outside.

You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it's for you all to decide how much weight to give any evidence. In making your decision, consider all of the evidence in the light of your reason, experience, and your common sense. You're not required to accept all of the evidence as true or accurate. You should not decide an issue by the simple process of counting up the number of witnesses who have testified on each side. You much consider all the testimony in the case, and you may decide the testimony of fewer witnesses on one side is more convincing than the testimony of more witnesses on [2885] the other side.

As I've told you, deposition testimony is testimony taken in front of a court reporter like this person, under oath, and you are to give it the same equal weight that you would if the person had been here live.

You are the sole and exclusive judges of the credibility or believability of the witnesses who have testified in this case. You must decide which witnesses you believe and how important you think their testimony is. You're not required to accept or reject everything a witness says. You're free to believe all, part, or none of any person's testimony.

In deciding what testimony you believe, you should rely on your own common sense and everyday experience. There is no fixed set of rules to use in deciding whether you believe a witness, but it may help you if you think about some of the following questions.

Was the witness, able to see, hear, or be aware of the things about which the witness testified. How well was the witness able to recall and describe those things. How long was the witness watching or listening. Was the [2886] witness distracted in any way. Did the witness have a good memory. How did the witness look and act while testifying. Was the witness making an honest effort to tell the truth, or did the witness evade questions. Did the witness have any interest in the outcome of the case. Did the witness have any motive, bias, or prejudice that would influence the witness's testimony. How reasonable was the witness's testimony when you consider all of the evidence in the case. Was the witness's testimony contradicted by what other witnesses said or had done at another time by the witnesses or by other evidence. Those are just some of the things you might

consider when determining the credibility of a witness.

There may be discrepancies or differences within a witness's testimony or between the testimony of different witnesses. This does not necessarily mean a witness should be disbelieved. Sometimes when two people observe an event, they will see or hear it differently. Sometimes a witness may have an innocent lapse of memory. Witnesses may testify honestly but simply be wrong about what they thought they saw or remembered. You should consider whether a [2887] discrepancy relates to an important fact or only an unimportant detail.

Usually witnesses are not permitted to testify about opinions or conclusions. However, a witness who has certain scientific, technical, or other specialized knowledge, skill, or experience may be permitted to give testimony in the form of an opinion. Those witnesses are often referred to as expert witnesses.

You should determine the weight you should give to any expert who has testified in this trial and think about the following: the education, qualifications, and experience of the witness; the credibility of the witness; the facts relied upon by the witness to support the opinion; reasoning used by the witness to arrive at the opinion; and any other matters upon which the opinion was based.

You should consider each expert opinion and give it the weight, if any, you think it deserves. You are not required to accept the opinion of any expert. An

expert was asked to assume that certain facts were true and to give an opinion based upon that assumption. That's called a hypothetical question. You must determine if [2888] any fact assumed by the witness has not been established by the evidence and the effect of that omission, if any, upon the value of the opinion.

The plaintiff here, Mr. Hensley, seeks to recover damages under the law of the United States, commonly referred to as the Federal Employers Liability Act. The Federal Employers Liability Act, under which the plaintiff claims the right to recover damages in the action, provides in part that every common carrier by railroad which engaging in commerce between any of the several states shall be liable in damages to any person suffering injury while employed by such care and such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

It is stipulated that at the time and place alleged in this complaint in this case CSX Transportation was a common carrier by railroad, engaged in interstate commerce. Thus Mr. Hensley was then an employee of CSX Transportation, engaged in such commerce, and that Mr. Hensley's right to recover based on the negligence cause of action is governed by the provisions of the [2889] Federal Employment Liability Act.

In this action Mr. Hensley has the burden of establishing by a preponderance of the evidence all

the facts necessary to prove the following issues: Was CSX negligent, even in the slightest; and did that negligence cause injury to Mr. Hensley; and what damages, if any, is he entitled to.

The defendant, CSX has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: was Mr. Hensley negligent, and did that negligence contribute to his injuries. Remember my definition of preponderance of the evidence means that amount of evidence that causes you to conclude the allegation is probably true.

To prove an allegation by the preponderance of the evidence, a party must convince you the allegation is more likely true than not. It is a mere tipping of the scales in Civil Court and not beyond a reasonable doubt as it is in Criminal Court. If the evidence on a particular issue is equally balanced, that issue has not been proven by a preponderance of the evidence, and the party having the burden of [2890] proving that issue has failed.

You must consider all of the evidence. I charge you that the standard of care that CSX owed Mr. Hensley was that of a reasonable, ordinary, and prudent railroad employer. An employer such as CSX Transportation has a duty to use ordinary care to provide employees with reasonably safe and suitable tools, machinery, and appliances with which to do their work.

Ordinarily and [sic] employee is not required to make an inspection of the tools that the employer furnishes. In absence of knowledge to the contrary and in the absence of circumstances that caution such employee or would caution a reasonably prudent person in a like position to the contrary, an employee may assume that the employer has furnished safe tools and appliances with which to perform such work and may rely and act on that assumption. However, it is not the duty of the employer to use ordinary care to discover open and obvious defects which render such tools dangerous to use in the performance of such work.

CSX cannot be found liable for Mr. Hensley's injuries unless there is evidence that [2891] the defendant knew or should have known that his employees were subjected to an unreasonable risk of injury as a result of their exposure to solvents and/or asbestos. There must be evidence that CSX knew or should have known of dangers associated with exposure to solvents and asbestos at the time Mr. Hensley alleges that CSX's conduct was negligent even in the slightest.

The test of foreseeability is whether in the light of all the circumstances a reasonably prudent Railroad should have anticipated that some injury was likely to result to an employee under the circumstances from any act or negligence, even in the slightest, of the defendant.

The law does not make CSX an insurer of the safety of its employees nor of the safety of the places in which they work because CSX is not bound to anticipate every possible incident or accident which might occur. A continuous duty exists on the part of an employer such as CSX Transportation to use ordinary care in furnishing its employees with a reasonably safe place in which to work. The amount of causation required of CSX Transportation to furnish its employees a reasonably safe place in which to work increases [2892] or decreases as to the dangers known to exist or that reasonably should have been apprehended.

In the absence of knowledge or notice to the contrary, and in the absence of circumstances that caution an employee or would caution a reasonably prudent person and a like person to the contrary, an employee may assume that the employer has exercised ordinary care in furnishing a reasonably safe place within which to work, and the employee may rely and act upon that assumption.

A duty to furnish a reasonably safe place to work is a nondelegable duty. Nondelegable, besides being hard to say, means that where, as in this case, daily duty required of an employer to provide a reasonably safe place to work for his employees, that duty and responsibility may not be transferred in any manner or in any degree to anyone else so as to relieve the employer of that duty. It is the continuing duty of the employee to exercise ordinary care for his own safety.

If a carrier such as CSX Transportation was negligent and its negligence was a cause in whole or in part of Mr. Hensley's [2893] injuries, CSX Transportation is liable in damages, although CSX Transportation's negligence was not the sole cause of the injuries and although the negligence of a third person may have contributed in equal, greater, or lesser degree in causing injury.

In deciding this case you must determine the fault, if any, of each of the parties. If you find more than one of the parties at fault, you will then compare the fault of the parties. To do this you will need to know the definition of fault. CSX is at fault if you find that CSX was negligent, even in the slightest, and that the negligence was a legal cause of injury to Mr. Hensley. The plaintiff, Mr. Hensley, is as [sic] fault if you find that he was negligent and that negligence was a legal cause of his injury.

Fault has two parts, negligence and legal cause. Negligence is the failure to use reasonable care. It's either doing something a reasonably careful person would not do or the failure to do something a reasonably careful person would do under circumstances similar to those shown by the evidence. A person may assume that every other person will use reasonable care [2894] unless the circumstances indicate to the contrary to a reasonably careful person.

The second part of fault is legal cause. A legal cause of any injury is a cause which in the natural and continuous sequence produces and [sic] injury. A

single injury can be caused by the negligent acts or omissions of one or more persons.

If you find that CSX was negligent, even in the slightest, and/or Mr. Hensley was negligent and that this negligence was a legal cause of the injury or damages for which a claim is made, you have found that party to be at fault. The plaintiff has the burden to prove defendant's fault, and if he fails to do so, you should find no fault on the part of CSX. Likewise, the defendant has the burden to prove Mr. Hensley's fault, and if CSX fails to so do, you should find no fault on the part of Mr. Hensley.

If you find more than one person to be at fault, you must then determine the percentage of fault chargeable to each of them. You must also determine the total amount of damages sustained by Mr. Hensley, if any. You must do so without reducing those damages by any percentage [2895] of fault you may have charged to Mr. Hensley. I'll instruct you on the law of damages in a moment.

If you decide Mr. Hensley is entitled to damages, you must fix an amount that will reasonably compensate the party for each of the following elements of claimed loss or harm if you find it was suffered by that party and was caused by the act or omission upon which you have made your findings of fact. Each of these elements of damage is separate. You may not duplicate damages for any element by also including the same loss or harm in another element of damage.

If you find Mr. Hensley is entitled to damages, the law simply says he is entitled to full, adequate, and complete compensation for all of the damages, losses, and injuries he has shown to have been caused by CSX. There are several elements you could consider if Mr. Hensley has proven these elements. Mr. Hensley would be entitled to be compensated for all the reasonable and necessary medical expenses which have been incurred from the date of the injury or injuries through today together with reasonably anticipated medical expenses which will be incurred in the [2896] future, if that has been proven.

Mr. Hensley is also entitled to recover for any loss in his earning capacity. Loss in earning capacity may or may not be the loss of actual earnings. The loss of actual earnings may be an indication of what someone's loss in earning capacity is, but it may not necessarily be the equivalent. The law says that if an injury lessens a person's physical and/or mental ability to earn a living, then that person is entitled to be compensated for that loss reducing the ability to earn.

To determine this, look at such things as the education, skill, and experience that an individual has. Look to the reputation of a person for working and sobriety. In these ways you would determine whether or not this accident or this injury has been caused – has caused a loss in capacity to earn. If the loss is proven Mr. Hensley is entitled to be compensated. Mr. Hensley is entitled to be compensated from the date of the injury to today and in the future. You

would consider such things as the nature and extent of the injury itself, whether the injury was temporary in nature, or whether it was [2897] permanent and the degree of permanency, if any.

Mr. Hensley would be entitled to recover separately for any pain and suffering. Pain and suffering is simply what it means. This amount compensates Mr. Hensley for any physical suffering and emotional suffering which he has sustained.

A decision cannot be based upon mere speculation or conjecture, but Mr. Hensley has no obligation to prove with mathematical certainty such intangible things as pain and suffering or loss of enjoyment of life. This will be for you all to decide. If Mr. Hensley has proved that a loss has, indeed, occurred, then its your duty to return a verdict for what you feel is a reasonable sum to compensate him.

You heard read into evidence certain mortality tables or life expectancy projections. These are tables and statistical data compiled by folks such as the U.S. Department of Labor, and all of you know that many of us live longer or shorter than tables would suggest. Accept these tables for whatever significance you give them.

The Court has given you various rules of law to help guide you to a just and lawful [2898] verdict. Whether some of these instructions will apply will depend upon what you all decide the facts are in this case. The Court's instructions on any subject, including damages, must not be taken by you to indicate my

opinion of what the facts are or what you should find in your verdict.

Some of you have taken juror notes. I used to not ever let folks take their notes back into the jury room, but after a three-week trial you'd probably shoot me if I didn't. Let me caution you about something, if I might. Some of you may be better note takers than others. Some of you may be oral learners, some of you visual learners. All of us are one or the other, usually not both.

It's best for you all to remember the evidence as each of you remembers it being said rather than what's in your notes because you may have simply written it down wrong. I'll caution you that you certainly can take your notes back, but do not try to persuade your fellow jurors that it's absolutely the truth, because you may have goofed. We all do.

Your attitude and conduct at the beginning of your deliberations are very [2899] important. It's rarely productive for any juror to immediately announce a determination to hold firm for a certain verdict before any deliberations or discussions take place. Taking that position might make it difficult for you to consider the opinions of your fellow jurors or change your mind, even if you later decide you might have been wrong.

Please remember that you are not advocates for one party or the other. You are the judges of the facts in this case. Each of you should deliberate and vote on each issue to be decided. Before you return your

verdict each of you must agree on the answer to each question on the jury verdict form which I am about to give you so that you will be able to state truthfully that the verdict is yours.

The verdict you return to the Court must represent the considered judgment of each juror. In order to return a verdict it's necessary that each juror agree to each answer, and your verdict must be unanimous. It's your duty to consult with one another and reach an agreement if you can do so without violence to your individual judgment. In other words, no [2900] bloodshed in the jury room. Each of you must decide the case for yourself, but do so only after impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if you're convinced it's not correct. Do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Then my favorite jury charge, chance or quotient verdicts are prohibited. We're not going to act like we're in Branson, Missouri. You cannot come up with – if you decide that somebody is entitled to damages in this case, you can't come up with 12 different numbers, add them all up, and divide by 12. We would have wasted three weeks here, so please do not do that.

If you have a question during deliberations and you need further instructions, please print your question on a sheet of paper, knock on the door or the jury room. Remember to knock hard because it's a double door. Only hand that question to John Harris back here, nobody [2901] else. I will read your question and the lawyers and I will discuss it, but please keep in mind that we cannot put somebody back on the stand. We cannot reopen the proof. You must determine – probably all I can do is read these instructions to you again or answer a simple question that does not involve the proof. Please keep that in mind.

You're now to retire and select one of yourselves to be the jury foreperson in this case. You are to report back to us as you wish to let us know when you do have a verdict. Let me tell you that your time is now your own. You can take your own breaks. You can do whatever you do, but let us know what you're doing. In other words, select a foreperson and let that person speak to John Harris, my officer, and let us know what you're up to.

Do not deliberate without all of you in the room together. If someone is in the rest room, please wait until they are back in the jury room before you start deliberations.

I'm going to hand this to you. I'm not saying you're the jury foreperson. You're just on the end. This sounds silly, too. Start with Number 1 and go down. Don't start at the [2902] back and work forward. It

won't work that way. I have had jurors try and do that, and it was really a mess. Please take that.

Ms. Smith, Ms. Sloan, if you all will stay in the courtroom. As you may have guessed, you are alternates. I am astounded that we went through three weeks of the trial and have 14 still standing or sitting. Thank you so much for all of your attention. Good luck with your pregnancy. We're all happy for you.

You all are now to retire. Take your notes and let us know what you need.

(Thereupon, at 2:02 p.m. the jury retired to deliberate upon a verdict.)

(Thereupon, and off-the-record discussion was held.)

THE COURT: Let the record reflect that the Court Officer has taken the charge back to the jury.

(Court was in recess.)

(Thereupon, the jury requested the exhibits at 2:12 p.m.)

MR. NICHOLS: On behalf of the parties and outside the presence of the jury and the Court, we have gone through the exhibits and have

* * *

APPENDIX B

(A) PERSONAL INJURY

T.P.I. 3 – CIVIL 14.10

PERSONAL INJURY – PAIN AND SUFFERING

Plaintiff shall be awarded the following elements of damage experienced in the past:

[Physical pain and suffering]

[Mental or emotional pain and suffering including anguish, distress, fear, humiliation, grief, shame or worry]

[Loss of capacity for the enjoyment of life]

[Disfigurement]

[You shall also award compensation for the present cash value of:

[Physical pain and suffering]

[Mental or emotional pain and suffering including anguish, distress, fear, humiliation, grief, shame or worry]

[Loss of capacity for the enjoyment of life]

[Disfigurement]

reasonably certain to be experienced by a party in the future].

There is no mathematical formula for computing reasonable compensation for [physical

pain and suffering] [mental or emotional pan and suffering] [disfigurement] [loss of capacity for the enjoyment of life], nor is the opinion of any witness required as to the amount of such compensation.

In making an award for such damages, you must use your best judgment and establish an amount of damages that is fair and reasonable in light of the evidence before you.

APPENDIX C

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE
CHARLES D. SUSANO, JR., SHARON G. LEE,
AND NORMA MCGEE OGLE

February 6, 2008

COURT OF APPEALS
CITY OF KNOXVILLE
AT UNIVERSITY OF TENNESSEE

THURSTON HENSLEY, Appellee/Plaintiff, v. CSX TRANSPORTATION, INC., Appellant/Defendant.	)	No. E2007-00323-COA-R3-CV

APPEARANCES:

FOR THE APPELLEE/PLAINTIFF:

H. DOUGLAS NICHOL, ESQ.
Attorney at Law
NICHOL & ASSOCIATES
Renaissance Business Center
6759 Baum Drive
Knoxville, Tennessee 37919

- and -

JOSEPH D. SATTERLEY, ESQ.
Attorney at Law
SALES, TILLMAN, WALLBAUM,
CATLETT & SATTERLEY, PLLC
325 West Main Street
Suite 2100
Louisville, Kentucky 40202

FOR THE APPELLANT/DEFENDANT:

GARETH S. ADEN, ESQ.
Attorney at Law
GULLETT, SANFORD, ROBINSON
& MARTIN, PLLC
315 Deaderick Street
Suite 1100
Post Office Box 198888
Nashville, Tennessee 37219-8888

- and -

RANDALL A. JORDAN, ESQ.
CHRISTOPHER R. JORDAN, ESQ.
Attorneys at Law
THE JORDAN FIRM
1804 Frederica Road
Suite C
Post Office Box 20704
St. Simons Island, Georgia 31522

PANEL OF JUDGES:

CHARLES D. SUSANO, JR.
SHARON G. LEE
NORMA MCGEE OGLE

* * *

[50] MR. ADEN: I'll be happy to. Thank you so much.

JUDGE LEE: Mr. Jordan. I've got one other question.

MR. RANDALL JORDAN: Yes, ma'am.

JUDGE LEE: I take it from reading the briefs, you – all are not challenging the amount of this verdict; is that correct?

MR. RANDALL JORDAN: We are not. We forgot.

JUDGE LEE: I just wanted to make sure. Thank you.

MR. RANDALL JORDAN: Thank you.

JUDGE SUSANO: Thanks to both sides for your arguments. It's a very interesting case.

MR. SATTERLEY: Thank you, Your Honor.

(End of Proceedings.)

MOTION

23

MOTION FILED

MAR 16 2009

(2)

No. 08-1034

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

THURSTON HENSLEY,

Respondent.

On Petition for Writ of Certiorari To the Court of Appeals of Tennessee

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: March 16, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondent declined to consent. Accordingly, this motion for leave to file is necessary.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

WLF supports efforts to ensure that those injured as a result of exposure to asbestos are adequately and promptly compensated for their injuries. WLF is concerned, however, that much of the money awarded as damages in asbestos liability cases has been paid to uninjured claimants. Accordingly, WLF has regularly participated in proceedings before this and other federal and state courts, to support procedures designed to ensure that the limited funds available to pay asbestos plaintiffs are reserved for those who have suffered serious injuries. *See, e.g., In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003); *Norris v. Crane Co., review denied*, __ Cal. 4th __, 2008 Cal. LEXIS 8680 (June 20, 2008); *General Electric Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007); *3M Co. v. Johnson*, 895 So. 2d 151 (Miss. 2005); *Ieropoli v. AC&S Corp.*, 577 Pa. 138 (2004).

WLF has also appeared in this Court in numerous cases arising under the Federal Employers' Liability Act (FELA), to support adoption of reasonable limitations on damages awardable under that statute. *See, e.g., Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003); *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997); *CONRAIL v. Gottshall*, 512 U.S. 532 (1994).

WLF is concerned that the decision below, if allowed to stand, would eliminate all meaningful constraints on the award of emotional distress damages in FELA cases in which the plaintiff has suffered at least some physical injury. In the absence of such constraints, courts are ill-equipped to weed out trivial or fraudulent claims, and FELA defendants are faced with the specter of unlimited and unpredictable liability.

WLF has no direct interest in the outcome of this litigation, financial or otherwise. Accordingly, WLF can provide the Court with a perspective not shared by any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302

Dated: March 16, 2009

QUESTION PRESENTED

In *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that, under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, a plaintiff may "seek compensation for fear of cancer as an element of his asbestos-related pain and suffering damages," with the "important" qualification that the plaintiff must "prove that his alleged fear is genuine and serious." 538 U.S. at 157. The Court also identified a number of "verdict control devices," including, "on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious." *Id.* at 159 n.19. The question presented is whether the Tennessee Court of Appeals erred in holding that a defendant is *not* entitled to a jury instruction that the plaintiff must prove his alleged fear of cancer to be "genuine and serious."

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of the Washington Legal Foundation are more fully set forth in the accompanying motion for leave to file this brief.[1] In brief, WLF is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

WLF has regularly participated in proceedings before this and other federal and state courts, to support procedures designed to ensure that the limited funds available to pay asbestos plaintiffs are reserved for those who have suffered serious injuries. WLF has also appeared in this Court in numerous cases arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, to support adoption of reasonable limitations on damages awardable under that statute. *See, e.g., Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003); *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997); *CONRAIL v. Gottshall*, 512 U.S. 532 (1994).

WLF is concerned that the decision below, if

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for WLF provided counsel for Respondent with notice of its intent to file this brief.

allowed to stand, would eliminate all meaningful constraints on the award of emotional distress damages in FELA cases in which the plaintiff has suffered at least some physical injury. In the absence of such constraints, courts are ill-equipped to weed out trivial or fraudulent claims, and FELA defendants are faced with the specter of unlimited and unpredictable liability.

STATEMENT OF THE CASE

Respondent Thurston Hensley is a 69-year-old man who was employed for many years as an electrician by Petitioner CSX Transportation, Inc. (CSX) and by another railroad later acquired by CSX. He alleges that during the course of his employment, CSX negligently exposed him to asbestos and Dowclene (a cleaning agent) and that the exposures caused him to contract asbestosis and toxic encephalophy.

CSX vigorously disputed that Hensley ever actually contracted those diseases. It noted, for example, that during the period he claimed to be injured, Hensley continued to work flawlessly for CSX until age 65 and to hold down a second job as a successful preacher; and that he was still driving a car at age 67 at the time of trial. Pet. 29-30 n.3. The jury found in favor of Hensley, finding that his claimed diseases were caused at least in part by CSX's negligence. Pet. App. 30a-33a. Those findings are not at issue in this petition.

At trial, Hensley sought to recover damages based on an alleged fear that, as a result of his exposure to asbestos, he might develop cancer later in life. CSX

disputed his claim that he actually had suffered serious emotional injury as a result of any such fears. CSX requested the trial judge to instruct the jury that Hensley could not recover pain and suffering damages caused by fear of cancer (a disease Hensley indisputably has not contracted), unless he could demonstrate that his alleged fear was "genuine and serious." The trial judge refused to give that instruction and instead told the jury that if it found in Hensley's favor, he would be entitled to compensation for "any physical suffering and emotional suffering which he has sustained." *Id.* at 62a.

The jury returned a verdict for Hensley and awarded $5,000,000 in damages. In a motion for a new trial and/or to alter or amend the judgment, CSX argued among other things that the trial court had erred in refusing to grant a directed verdict on Hensley's fear-of-cancer claim and in refusing to give CSX's proposed instruction that a fear of cancer is compensable only if it is "genuine and serious." The trial court denied the motion and entered judgment. *Id.* at 46a-54a.

The Tennessee Court of Appeals affirmed. *Id.* at 1a-37a. The Court of Appeals rejected all of CSX's claims, including claims that Hensley had submitted insufficient evidence to support damages based on fear of cancer and that the trial court erred in failing to give CSX's proposed "genuine and serious" instruction. *Id.* at 33a-36a. The court said that such an instruction was not required by *Ayers*, and that requiring such an instruction "would make little sense." *Id.* at 34a. The court said that a "genuine and serious" instruction would do nothing to dissuade "[a]ny juror who might be predisposed to grant a large award based on shaky

evidence of fear of cancer." *Id.* The court held that because a jury, based on the evidence at trial, *could* reasonably have found that Hensley's fear of cancer was "genuine and serious," the $5,000,000 damages award did not run afoul of *Ayers*. *Id.* at 34a-36a.

CSX filed an application for permission to appeal in the Tennessee Supreme Court, once again raising the issue of whether the trial court's refusal to give a "genuine and serious fear" instruction constituted reversible error. On November 17, 2008, the Tennessee Supreme Court denied the application. *Id.* at 45a.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. In creating rules governing the recovery of FELA damages, the Court has acknowledged several policy considerations that suggest the need for caution in awarding damages for negligent infliction of emotional distress. Those policy considerations include "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Gottshall*, 512 U.S. at 557. The Court has been sufficiently concerned by those issues that in FELA cases it has barred altogether recovery for emotional distress caused by fear of developing cancer in the future if the emotional distress is not tied to a physical injury.

The three policy considerations are no less pertinent simply because, as here, the jury found that the plaintiff's claimed fear of cancer was, in fact, tied to

a physical injury. The dangers of trivial or fraudulent emotional distress claims still exist, and as does the specter of unlimited and unpredictable liability. The Court held in *Ayers* that those dangers were somewhat reduced by the added presence of a physical injury. Accordingly, *Ayers* did not prohibit altogether the recovery of fear-of-cancer damages in such cases; rather, it determined that the three policy concerns could be satisfied so long as recovery was limited to situations in which the finder of fact determines that the emotional distress caused by fear of cancer is "genuine and serious." *Ayers*, 538 U.S. at 157. The Court made clear that this limitation on damages was an "important reservation" and was not met, *inter alia*, by a "general concern for one's future health." *Id.* at 157-158. It held that FELA defendants were entitled, upon request, to a jury instruction that limits emotional distress damages based on fear of cancer to situations in which the fear is "genuine and serious." *Id.* at 159 n.19.

The Tennessee Court of Appeals has either misread *Ayers* or has chosen to ignore *Ayers*'s mandate. It has decided that "genuine and serious" jury instructions are unwarranted in FELA cases in Tennessee courts because, in the court's view, they "make little sense." Nor is Tennessee alone in failing to comply with *Ayers*; Missouri courts have also determined that a "genuine and serious" jury instruction is unwarranted in FELA cases involving fear-of-cancer claims.

The policy considerations highlighted above make abundantly clear why the error by the court below is not a mere trivial matter but rather warrants the Court's review. *Ayers* permitted recovery of damages based on

fear-of-cancer claims, despite its recognition that it can often be difficult to weed out trivial or fraudulent claims and that such claims can often lead to unlimited and unpredictable liability. It did so with the explicit understanding that those concerns would be ameliorated by a rule barring recovery unless the jury explicitly found that the alleged fear was genuine and serious.

By doing away with the bar on recovery in the absence of a "genuine and serious" jury finding, the Tennessee Court of Appeals is stripping FELA defendants of the principal protection that *Ayers* afforded them against unwarranted and unprincipled jury verdicts. Review is urgently warranted to prevent asbestos-related FELA litigation from becoming the unmitigated disaster that all agree has befallen common-law asbestos liability litigation. The Court has on several occasions washed its hands of responsibility for that disaster and suggested that any solution must come from Congress. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). Passing responsibility to Congress is not an answer to the mounting backlog of asbestos cases raising FELA claims; Congress has left it to this Court to craft and implement the rules governing such litigation. In *Gotshall*, *Metro-North*, and *Ayers*, the Court crafted a series of rules governing the award of emotional distress damages in FELA cases. It is now incumbent on the Court to ensure that those rules are being followed.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IGNORED *AYERS* AND DID SO BASED ON A RATIONALE THAT DEFIES LOGIC

Common law is sharply split on whether individuals who have suffered physical injury as a result of another's negligence may recover emotional distress damages based on a fear that the defendant's negligent conduct may cause them to develop cancer at some unspecified time in the future. *Compare Celotex Corp. v. Wilson,* 607 A.2d 1223 (Del. 1992) (permitting damages for asbestosis claimant's fear of cancer), *with Simmons v. Pacor, Inc.*, 543 Pa. 644 (1996) (denying damages based on fear of cancer). In *Ayers*, the Court (by a 5-4 vote) sided with those common-law courts that have permitted recovery and held that such fear-of-cancer claims are cognizable in FELA suits. 538 U.S. at 145-59. But it did so with an "important reservation": "It is incumbent upon [the] complainant . . . to prove that his alleged fear is genuine and serious." *Id.* at 157. The court held that several "control devices" are available to ensure that fear-of-cancer claims are not compensated unless they meet the genuine-and-serious threshold; among the "control devices" it cited was the right to, "on a defendant's request, a [jury] charge that each plaintiff must prove any alleged fear to be genuine and serious." *Id.* at 159 n.19.

Despite *Ayers*'s explicit statement that defendants are entitled to a jury charge that fear-of-cancer claims are not compensable unless they are "genuine and serious," the trial court refused CSX's request to give such a charge, and the Tennessee Court of Appeals

affirmed, in an opinion that indicated that such charges should never be given in Tennessee courts. Pet. App. 34a. The appeals court agreed with a Missouri appellate court's conclusion that "'*Ayers* does not require . . . instructions detailing or explaining damages on a fear of developing cancer. . . [T]he Court in *Ayers* did not discuss or authorize jury instructions on this issue.'" Pet. App. 33a-34a (quoting *Hedgecorth v. Union Pac. R.R. Co.*, 210 S.W.3d 220, 228-29 (Mo. App. 2006)). The Tennessee Court of Appeals opined that such a jury instruction requirement "would make little sense," explaining:

> One purpose of the "genuine and serous" requirement, we believe, is to protect defendants from excessive verdicts based on appeals to jurors' passions with respect to the deeply emotional issue of cancer. Because the mere suggestion of a possibility of cancer has the potential to evoke raw emotions, a juror may be swayed by the barest shred of evidence that a defendant has caused a plaintiff to suffer an increased risk and/or fear of cancer, and may be tempted to overcompensate the plaintiff for such a risk or fear. In light of this reality, little if any purpose would be served by instructing the jury that the plaintiff's fear must be "genuine and serious." Juries do not routinely grant multimillion-dollar awards for injuries that the jurors might regard as non-genuine or unserious. Any juror who might be predisposed to grant a large award based on shaky evidence of a fear of cancer is unlikely to be swayed by the language of *Ayers*. Rather, it is for the courts to serve as

> gatekeepers in this regard, to ensure that fear of cancer claims do not *go* to the jury unless there is credible evidence of a "genuine and serious" fear.

Id.

Review is warranted because the decision below so obviously conflicts with *Ayers* and ensures that trial courts in Tennessee (in line with those in Missouri) will conduct FELA trials that do not comply with *Ayers*'s mandate. The appeals court's statement that *Ayers* neither "discuss[ed]" nor "authoriz[ed]" jury instructions that cancer fears are not compensable unless "genuine and serious" is demonstrably wrong, and was made without any discussion of *Ayers*'s Footnote 19, which discusses the jury instruction requirement.

Moreover, the appeals court's rationale for abandoning the jury instruction requirement makes no sense whatsoever. Petitioner has already spelled out in detail all the logical inconsistencies in the appeals court's rationale. Pet. 16-19. Accordingly, we will not repeat those details here. Suffice to say that, under the appeals court's rationale, Tennessee courts will affirm multi-million dollar FELA judgments for plaintiffs claiming fear of cancer but with only minor physical injuries – without *anyone* actually determining that the plaintiff's fear of cancer is "genuine and serious." A trial court and Tennessee appellate courts will not have made that determination; under the appeals court's ruling, they consider only whether a rational jury, if it "reasonably believed [an] [e]mployee's evidence, . . . could have found that a genuine and serious fear of

cancer existed." *Id.* at 36a. Nor will a jury have made that determination; it cannot possibly have determined that a plaintiff's claimed fear of cancer is "genuine and serious" when it has not been asked to do so.[2]

In sum, review is warranted to address the serious conflict between the decision below and this Court's *Ayers* decision.

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[2] The appeals court's response – that "[j]uries do not routinely grant multi-million dollar awards for injuries that the jurors regard as non-genuine or unserious" and that a jury inclined to do so would not be dissuaded by an instruction directing them not to do so, *id* at 34a – is belied by the history of asbestos litigation over the past four decades, which has seen many huge judgments awarded to plaintiffs with minor injuries. The danger of large awards for emotional distress based on genuine but not-out-of-the-ordinary fears of cancer is magnified in FELA cases, in which punitive damage awards are not generally permitted. *Wildman v. Burlington Northern R.R. Co.*, 825 F.2d 1392 (9th Cir. 1987). Jurors who believe that the plaintiff's fear of developing cancer in the future do not rise to the "serious" level, but who believe that the defendant deserves to be punished for its negligence, may decide to award massive emotional distress damages as an alternative to punitive damages. Indeed, that may be precisely what happened in this case; the jury awarded $5,000,000 in damages to a man claiming a fear of developing cancer, even though: (1) his chances of developing cancer were not appreciably higher than those of any man his age; and (2) there was little evidence that any fear of cancer he experienced was either genuine or serious; and (3) his anxiety symptoms pre-dated the diagnosis of asbestosis (the event that allegedly triggered his fear of cancer), as demonstrated by the fact that he had been prescribed Xanax (an anti-anxiety medication) long before the contested asbestosis diagnosis was made.

II. REVIEW IS WARRANTED TO ENSURE THAT REASONABLE LIMITS CONTINUE TO BE IMPOSED ON EMOTIONAL DISTRESS DAMAGE AWARDS IN FELA LITIGATION

In a series of decisions issued over the past 15 years, the Court has crafted rules designed to impose reasonable limitations on the award of emotional distress damages in FELA litigation. Review is warranted to ensure that those limitations are not rendered ineffective by lower courts' unwillingness to abide by the control devices mandated by the Court.

The first of the Court's recent FELA decision addressing emotional distress damages was the 1994 *Gottshall* decision. The plaintiff in that case filed suit under FELA, alleging that he suffered severe emotional distress when he witnessed the death of a co-worker while on the job. The Court held that claims for negligent infliction of emotional distress were cognizable under FELA. *Gottshall*, 512 U.S. at 550. The Court nonetheless acknowledged several policy considerations – also recognized by the common law – that suggested the need for caution in awarding such emotional distress damages. Those policy considerations included "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Gottshall*, 512 U.S. at 557. Those policy concerns led the Court to conclude that when plaintiffs claim to have suffered emotional distress damages unaccompanied by physical injury, recovery is limited to those who can meet the common-law "zone of danger"

test – that is, those whose emotional injury is caused by having been "placed in immediate risk of physical harm by [the defendant's negligent] conduct." *Id.* at 548.

Three years later, the Court considered the FELA emotional distress claims of a plaintiff who had been exposed to asbestos-laden insulation dust while employed as a pipefitter by a railroad. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997). The exposure had not caused any physical injuries, but he feared – with some cause – that he might develop cancer. The Court repeated the policy reasons, set forth in *Gottshall*, for limiting the circumstances under which FELA plaintiffs should be permitted to recover emotional distress damages. *Id.* at 433. In stressing two of those policy considerations – the difficulty in weeding out trivial and invalid claims – the Court noted that "apart from [the plaintiff's] own testimony, there was virtually no evidence of distress." *Id.* The Court concluded that prolonged exposure to asbestos did not by itself constitute a physical injury and thus, under the rule announced in *Gottshall*, the plaintiff could not recover under FELA for his negligently inflicted fear of developing cancer. *Id.* at 428-38.

Finally, in *Ayers* the Court considered whether a FELA plaintiff who has been negligently exposed to asbestos and who has developed at least some physical injuries (but not cancer) may recover emotional distress damages based on a fear of developing cancer in the future. The *Ayers* Court answered "yes," concluding that concerns over "unlimited" and "unpredictable" liability for emotional distress damages are reduced when "the universe of potential claimants" is reduced by

eliminating those who have not suffered any physical injury. *Ayers*, 538 U.S. at 157. But in light of the previously expressed policy concerns, the Court added "an important reservation": a FELA claimant suffering from asbestosis may obtain compensation based on fear of cancer only if he can "prove that his alleged fear is genuine and serious." *Id.* "'General concern for one's future health'" is "insufficient to support recovery for an asbestosis sufferer's fear of cancer." *Id.* at 158 (quoting *Smith v. A.C. & S., Inc.*, 843 F.2d 854, 859 (5th Cir. 1988)).

As *Ayers* made clear, the policy considerations identified in *Gottshall* and *Metro-North* do not become irrelevant simply because, as here, the jury found that the plaintiff's claimed fear of cancer was, in fact, tied to a physical injury (in this case, asbestosis).[3] The dangers of trivial or fraudulent emotional distress claims still exists, as does the specter of unlimited and unpredictable liability. And as *Metro North* pointed out, those dangers are particularly great when, as was true in *Metro North* and is also true here, the only real evidence of emotional distress attributable to a fear of

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[3] The importance of strict enforcement of *Ayers*'s "genuine and serious" fear-of-cancer requirement in asbestosis cases is made clear when one considers the nature of that disease. Asbestosis is a set of lung disorders for which no causal link to cancer has been established. *See* A. Chung & F. Green, PATHOLOGY OF LUNG DISEASE 312 (2d ed. 1998). In some instances, the patient may suffer severe loss of lung function; in other instances, as in Hensley's, any loss in lung function is relatively mild. There is increased reason to question whether the emotional distress brought on by fear of asbestos-related cancer meets the "genuine and serious" threshold when the patient's physical impairment from asbestosis is relatively mild.

cancer is the plaintiff's own testimony. *Metro-North*, 521 U.S. at 433.

The Court held in *Ayers* that the dangers identified in *Gottshall* and *Metro-North* were somewhat reduced by the added presence of a physical injury. It thus imposed a somewhat looser restriction than the prior two cases on the award of emotional distress damages, the requirement that any fear of cancer be "genuine and serious." As one of the "control devices" designed to ensure that the "genuine and serious" fear of cancer limitation had teeth, the Court held that FELA defendants were entitled, upon request, to a jury instruction that limits emotional distress damages based on fear of cancer to situations in which the fear is "genuine and serious." *Ayers*, 538 U.S. at 159 n.19.

The policy considerations highlighted above make abundantly clear why the error by the court below is not a mere trivial matter but rather warrants the Court's review. *Ayers* permitted recovery of damages based on fear-of-cancer claims, despite its recognition that it can often be difficult to weed out trivial or fraudulent claims and that such claims can often lead to unlimited and unpredictable liability. It did so with the clear understanding that those concerns would be ameliorated by a rule barring recovery unless the jury explicitly found that the alleged fear was genuine and serious.

By doing away with the bar on recovery in the absence of a "genuine and serious" jury finding, the Tennessee Court of Appeals is stripping FELA defendants of the principal protection that *Ayers*

afforded them against unwarranted and unprincipled jury verdicts. Review is urgently warranted to prevent asbestos-related FELA litigation from becoming the unmitigated disaster that all agree has befallen common-law asbestos liability litigation.

As more and more major corporations are being driven into bankruptcy by asbestos litigation liabilities, one must question the priorities of a tort system that awards millions of dollars in damages to those who claim to fear developing cancer yet are unlikely ever to do so. As this Court has recognized, corporate funds to compensate those with asbestos-related injuries are rapidly dissipating, and there may well be inadequate funds available to compensate those likely to develop mesothelioma and other fatal asbestos-related cancers in the years to come. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 598 (1997) ("'Exhaustion of assets threatens and distorts the process; and future claimants may lose altogether'") (quoting *Report of the Judicial Conference Ad hoc Committee on Asbestos Litigation* 2-3 (Mar. 1991).

In the six years since *Ayers* was decided, the asbestos litigation crisis has only grown worse. *See generally* Patrick M. Hanlon and Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525 (2007). Asbestos-related corporate bankruptcies have continued unabated, and 2005 estimates pegged the number of yet-to-be-filed asbestos lawsuits at 2,000,000. Stephen J. Carroll, *et al.*, ASBESTOS LITIGATION 109, 106 (Rand Institute for Civil Justice 2005). A congressional effort to adopt asbestos litigation reform legislation fell apart in 2006, and no new legislation is expect in the near

term.

The Court on several occasions has washed its hands of responsibility for the asbestos litigation disaster and suggested that any solution must come from Congress. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. at 821 ("the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."). Passing responsibility to Congress is not an answer to the mounting backlog of asbestos cases raising FELA claims, almost every single one of which seeks to recover fear-of-cancer damages; Congress has left it to this Court to craft and implement the rules governing such litigation.[4] In *Gotshall, Metro-North,* and *Ayers*, the Court crafted a series of rules governing the award of emotional distress damages in FELA cases. It is now incumbent on the Court to ensure that those rules are being followed.

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[4] Moreover, Congress made clear in adopting FELA that its primary focus was on present injuries. The statute provides a cause of action for "any person suffering injury," 45 U.S.C. § 51, not for persons "at risk of suffering injury," or "who fear they will suffer an injury." That statutory language represents a clear mandate to the Courts from Congress to take effective steps to ensure that FELA remedies are being afforded only to those with real, current injuries.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari. In the alternative, the petition should be granted and the judgment below summarily reversed.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: March 16, 2009

MOTION

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(3)

No. 08-1034

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

THURSTON HENSLEY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505

Counsel for Amicus

* Counsel of Record

March 16, 2009

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CSX TRANSPORTATION, INC.,
Petitioner,

v.

THURSTON HENSLEY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. Petitioner has consented to AAR's filing of a brief.* In accordance with Rule 37.2(a), AAR has provided notice to Respondent's counsel of AAR's intent to file a brief. Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and

* The letter expressing consent has been filed with the Clerk of the Court.

Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. On issues of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

This case, arising under the Federal Employers' Liability Act (FELA), presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend close to a billion dollars annually in defending and resolving claims and suits brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

The issue raised in this case can arise in thousands of FELA cases and can significantly impact the damage awards in those cases. In *Norfolk & Western Ry. Co. v. Ayers*, this Court held that FELA plaintiffs with symptoms of an asbestos-related injury could recover damages for reasonable fear of cancer so long as that fear was "genuine and serious." The Court also made clear that it anticipated that lower courts would utilize verdict control devices to limit fear of cancer claims to only those supported by evidence of

genuine and serious emotional distress. In this case, the court below affirmed the trial court's improper refusal to instruct the jury that damages may be awarded for fear of cancer only if that fear is genuine and serious. If courts continue to take this kind of approach to claims for fear of cancer—and divergent approaches already are being taken by lower courts on this issue—it will open the floodgates to such claims in virtually all of the thousands of FELA asbestos cases pending against AAR member railroads, an outcome clearly not intended by this Court's decision in *Ayers*. In its brief, AAR will urge this Court to grant certiorari in order to clarify that proper instructions on fear of cancer claims must be given if requested by the defendant.

All of AAR's large members, who are facing numerous FELA claims in which fear of cancer damages likely will be sought, have a strong interest in the issue presented by this case. When AAR participates as *amicus curiae* in a FELA case like this one, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling by bringing the perspective of an entire industry, which often is different from that of the individual

litigant, which may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505

Counsel for Amicus

* Counsel of Record

March 16, 2009

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IN THE

Supreme Court of the United States

No. 08-1034

CSX TRANSPORTATION, INC.,
Petitioner,

v.

THURSTON HENSLEY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The interest of a*micus curiae* Association of American Railroads (AAR) is set forth in the Motion for Leave to File a Brief which is filed along with this brief.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case in the Petition.

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

SUMMARY OF THE ARGUMENT

This Court should grant the petition because this case presents an important issue that will impact thousands of cases arising under the Federal Employers' Liability Act. 45 U.S.C. §§51-60. This Court has held that plaintiffs who have an asbestos-related injury may recover pain and suffering damages for fear of contracting cancer, but only if that fear is genuine and serious. The Court made it clear that this qualification was intended to require trial courts to utilize verdict-control devices to limit the number of cases in which plaintiff would qualify for such damages. Among other things, trial courts must instruct jurors that in order to recover for fear of cancer plaintiffs must prove that their fear is genuine and serious. In refusing to give such an instruction upon the defendant's request, the court below failed to play the gatekeeper role envisioned by this Court.

To date, lower courts have taken different approaches to fear of cancer claims in FELA cases, with two state courts failing to assure that juries are properly instructed when addressing fear of cancer claims. On a range of issues arising under FELA, this Court has made it clear that juries must be properly instructed on the applicable substantive law, and that it is error for a trial court to fail to do so. This Court should review this case to correct the trial court's erroneous refusal to instruct the jury on an important issue that will recur with great frequency under FELA.

There are thousands of FELA asbestos claims pending against railroads. In addition there are many other FELA cases pending in which the plaintiff has alleged exposure to a substance, other than

asbestos, which is claimed to cause cancer. In virtually all of these cases, damages for fear of cancer are likely to be sought. Without a clear mandate from this Court on the need for proper instructions, lower courts will continue to address this issue in a non-uniform manner. Moreover, to the extent other lower courts follow the court below and decline to give proper instructions, it will open the floodgates to fear of cancer claims, exactly the opposite of the result that this Court envisioned.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO CLARIFY THAT TRIAL COURTS HAVE AN OBLIGATION TO GIVE PROPER INSTRUCTIONS WHERE FELA PLAINTIFFS SEEK DAMAGES FOR FEAR OF CANCER

This case presents the straightforward issue of whether a trial court has an obligation to instruct the jury on a relevant issue of substantive law in FELA cases. The court below did not. Certiorari should be granted because the issue raised by the lower court's refusal properly to instruct the jury will be faced by state and federal courts throughout the country in virtually every FELA asbestos case. Not only is this issue likely to recur, it will directly impact the quantum of damages for which defendants will be liable.

A. The Court Below Ignored its Obligation to Give Proper Instructions on Fear of Cancer Damages as Required by This Court in *Norfolk & Western Ry. Co. v. Ayers*

In the case below, respondent sought damages under FELA for, among other things, his fear of

cancer related to alleged exposure to asbestos while working for petitioner. Without having been instructed on the threshold showing, recently articulated by this Court, that a FELA plaintiff must make in order to qualify for fear of cancer damages, the jury awarded respondent $5 million in damages in a general verdict. In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that FELA plaintiffs with asbestosis could recover damages for reasonable fear of cancer, as a component of pain and suffering, so long as that fear was "genuine and serious." This Court further held that upon request FELA defendants are entitled to an instruction "that each plaintiff must prove any alleged fear of cancer to be genuine and serious." *Id.* at 159, n.19.[2] Although the plaintiff presented evidence of, and sought damages for, fear of cancer, the trial court refused to instruct the jury on the condition that *Ayers* placed on recovery of such damages, a ruling affirmed by the Court of Appeals.

In permitting FELA plaintiffs who suffer from an asbestos-related injury to recover for fear of cancer, as a component of pain and suffering damages, this Court went to great lengths to point out that it was doing so with "an important reservation." *Id.* at 157. Following on concerns expressed in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) and *Metro*

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[2] Although the Court "resisted" providing any elaboration on the nature of the evidence required to sustain a claim for genuine and serious fear of cancer, *id.* at 158, n. 17, Justice Breyer did not resist, proposing that fear of cancer damages be limited to situations where the plaintiffs fear "is unusually severe-where it significantly and detrimentally affects the plaintiff's ability to carry on with everyday life and work." 538 U.S. at 187 (Breyer, J., concurring and dissenting in part).

North Commuter R.R. v. Buckley, 521 U.S. 424 (1997), the *Ayers* Court made it clear that such claims are to be "cabined" by the requirement that fear of cancer damages are available only to those plaintiffs who can demonstrate a "genuine and serious" fear, with the expectation that such awards would be made in a limited number of cases. 538 U.S. at 158-59. Responding to Justice Kennedy's dissenting opinion, which suggested the Court was ignoring the concerns expressed in *Gottshall* and *Buckley* over the "unlimited and unpredictable" liability that would follow a failure to limit the availability of damages for fear of cancer, the majority explained that verdict control devices available to trial courts, including, but not limited to, a proper charge to the jury, would assuredly avoid that result. *Id.* at 159, n.19.[3] It has already become apparent, however, that this message has gone unheeded in some courts.

The Court of Appeals acknowledged that "it is incumbent upon [a FELA plaintiff seeking fear of cancer damages] to prove that his alleged fear is genuine and serious." *Hensley v. CSX Transp., Inc.*, 2008 WL 683755 at *16 (Tenn. App. 2008). However, the Court went on to find that a trial court has no obligation to instruct the jury on the very facts that it acknowledged the plaintiff must prove to sustain his claim.[4] Following *Hedgecorth v. Union Pac. R.R.*, 210 S.W.3d 220 (Mo. App. 2006), the Court of Appeals took the position that *Ayers* did not address jury

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[3] In both *Gottshall* and *Buckley*, this Court enunciated limiting rules on recovery for emotional distress out of concern over unlimited and unpredictable liability.

[4] Incredibly, the Court of Appeals justified this refusal, in part, on the grounds that members of the jury might not follow the instructions. 2008 WL 683755 at *16.

instructions, but merely "ruled on substantive law." This conclusion is incorrect, see Petition at 15; even if it were correct, it would not justify the trial court's refusal to give a proper instruction.

It is well established that a trial court hearing a FELA case has an obligation to give an instruction that properly informs the jury on the relevant substantive law.[5] For example, in *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 498 (1980), this Court held that it was error to fail to instruct the jury that damages awarded to the plaintiff are not subject to federal income taxes. This Court held that, in order to avoid an inflated damages award, it was essential to assure that members of the jury did not hold the mistaken belief that the award it made would be subject to income taxes. *See also St. Louis SW Ry. v Dickerson*, 470 U.S. 409, 411 (1985)(A FELA defendant has the right to an instruction that damages must be reduced to present value.) Moreover, juries must not only be instructed on the substantive law, those instructions must be accurate. In *Seaboard Air Line Ry. v. Tilghman*, 237 U.S. 499 (1915), this Court reversed a verdict for the plaintiff because the trial court failed properly to instruct the jury on the law of comparative negligence under FELA.[6] The trial court's instruction that the jury was to reduce any award to account for the plaintiff's contributory negligence by "whatever you think would be proper" was deemed error by this Court

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[5] The Court of Appeals seemed to recognize this, explaining that "trial courts must give substantially accurate instructions concerning the law applicable to the matter at issue," 2008 WL 683755 at *2, only to ignore this axiom when addressing the issue of fear of cancer.

[6] *See* 45 U.S.C. §53.

because it failed to inform the jury that such a deduction must be in the proportion that the employee's negligence bears to the total causal negligence. *Id.* at 501. *See also Harris v. Illinois Cent. R.R.*, 58 F.3d 1140, 1144 (6th Cir. 1995); *Wise v. Union Pac. R.R.*, 815 F.2d 55, 57 (8th Cir. 1987) (FELA defendant is entitled to a proper instruction on contributory negligence if there is any evidence to support that theory.) In *Norfolk Southern Ry. Co. v. Sorrell,* 549 U.S. 158 (2007), this Court again underscored the importance of proper instructions, reversing the lower court because the Missouri Court of Appeals approved instructions given at trial incorrectly informed the jury that the standard of causation applicable to employer negligence differed from the standard applicable to employee contributory negligence.

Nonetheless, doubting the efficacy of a proper instruction, the Court of Appeals found the trial court's review of the sufficiency of the evidence to be an adequate substitute for a proper instruction. In performing that review, the Court found it sufficient that the plaintiff had testified that he experiences "anxiety" (as opposed to only "worry") about contracting cancer, for which he was taking the prescription medication Xanax. The court also found that even though the plaintiff testified that he began taking the medication before he learned he had asbestosis, the jury could have concluded that his fear of cancer was "at least *part* of the reason [the plaintiff] has *continued* to take Xanax." 2008 WL 683755 at *17 (emphasis in the original).

The Court of Appeals concluded that if the jury believed respondent's evidence it could have found that a genuine and serious fear of cancer existed.

This analysis only underscores the need for proper jury instructions. Rather than speculate on what the jury could have found, it would have been far more meaningful, and consistent with the law, had the jury actually been advised of what it was required to find in order to award damages for fear of cancer. See Petition at 17-19.

B. Guidance is Needed From This Court on a Trial Court's Obligation to Give Proper Instructions Where FELA Plaintiffs Seek Fear of Cancer Damages Because This Issue Will Both Pervade and Greatly Impact FELA Litigation

Not only was it error for the trial court to refuse properly to instruct the jury, it was an error that has the potential to be repeated in numerous cases and to have a marked impact on the outcome of those cases. Currently, thousands of FELA claims alleging asbestos-related disease are pending against the nation's railroads. In addition, there are many pending claims that allege an injury resulting from other exposures that plaintiffs typically have attempted to link to cancer, such as diesel exhaust and solvents. Indeed, AAR member railroads report that so-called occupational exposure cases have come to represent a significant portion of the FELA actions brought against them. Many of these cases raise the potential for including "fear of cancer" as an element of the plaintiff's damages. Additionally, this issue will impact cases that arise under the Jones Act, a compensation statute governing seamen which incorporates the substantive law of FELA. 46 U.S.C. §30104(a); *see Hagerty v. L&L Marine Services, Inc.*, 788 F.2d 315 (5th Cir.), *modified on denial of reh'g en*

banc, 797 F.2d 256 (1986) (permitting Jones Act plaintiff to recover for fear of cancer).

Asbestos litigation in the railroad industry has followed the general pattern seen in the civil justice system as a whole.[7] FELA suits alleging asbestos exposure were first seen in significant numbers in the early 1980s. While at various points it appeared that FELA asbestos claims were in decline, the number of filings invariably picked up again. Despite the fact that significant use of asbestos in the rail industry ended in the 1950s with the phase-out of steam locomotives, FELA claims for asbestos-related injures continue to be filed in large numbers. This phenomenon is no doubt driven in part by the active efforts of plaintiffs' counsel to mine for new claims. *See Adams v. Herron*, 191 F.3d 447, 1999 WL 710326 (4th Cir. 1999)(Plaintiffs' counsel offered free x-rays, which were reviewed and interpreted by a non-treating physician hired by the firm.) *See also In re: Asbestos Product Liability Litigation*, (No. VII), MDL Docket No. 875, slip op. at 3, n.4 (E.D. Pa. Feb. 24, 2009)(describing the use of screening companies that use mobile x-ray machines set up in public places to identify potential asbestos plaintiffs). "Asbestos litigation over time has been shaped by . . . the rise of a sophisticated and well-capitalized plaintiff bar." RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION 21 (2005).

As of the beginning of this year, the eight largest U.S. freight railroads and Amtrak have advised AAR that they are facing over 9,000 pending asbestos

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[7] See Edward J. McCambridge, *Asbestos Litigation: Where We Have Been, Where We Are Now, Where We Are Going*, 57 FED'N DEF. & CORP. COUN. Q. 409 (2007).

cases. Since *Buckley* has ruled out claims based solely on exposure, in all of these cases the plaintiffs presumably alleges that they are suffering from an asbestos-related injury, the very kind of claim which *Ayers* holds potentially qualifies for fear of cancer damages.[8] Moreover, fear of cancer claims will not necessarily be limited to asbestos litigation. *See Ayers*, 538 U.S. at 150, n.10. (citing to cases alleging fear of cancer due to exposures to substances other than asbestos).[9] The large railroads have advised AAR that over 600 FELA claims are pending in which the plaintiff claims exposure to substances other than asbestos that allegedly also can result in contracting cancer. Specifically, rail employees and former employees have brought and continue to bring claims alleging they have been injured due to workplace exposure to alleged carcinogenic substances, such as diesel exhaust, chemical solvents, silica and other toxic or deleterious substances. *E.g., Baker v. Norfolk Southern Ry. Co.*, 514 S.E.2d 448, (Ga. App.), *cert. denied*, 528 U.S. 1021 (1999) (alleging locomotive engineer's cancer was caused by prolonged exposure to exhaust from railroad's diesel locomotives).[10]

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[8] *Buckley* held that individuals who are exposed to asbestos, but who are without symptoms of a disease, cannot recover for emotional distress. 521 U.S. at 427. Though some of the pending FELA claims allege that the plaintiff has cancer, the railroads report that these constitute less than 5% of the total. Thus, the vast majority of the pending FELA asbestos claims allege a non-malignant asbestos-related injury and are likely to include a fear of cancer allegation.

[9] Claims for fear of diseases other than cancer have been recognized under FELA. *E.g., Marchica v. Long Island R.R.*, 31 F.3d 1197 (2d Cir. 1994) (fear of contracting AIDS).

[10] In 2006, class action lawsuits were filed against Norfolk Southern and CSX Transportation, and their predecessor rail-

Fear of cancer claims can lead to substantial awards. Even if much of the $5 million awarded here was for other elements of the plaintiff's damages, it is likely that a significant amount was awarded for his fear of cancer claim. Given the substantial number of pending FELA actions that will present similar claims, the consequence of failing properly to instruct a jury will be significant. For example, in *Ayers*, the verdicts for the six plaintiffs ranged from $700,000 to $1.2 million. 538 U.S. at 144. Considering that the plaintiffs were not seriously ill, and were retired (precluding damages for lost wages), it is likely that the jury made substantial awards for fear of cancer damages. Because awards on such claims are inherently unpredictable, and because allegations of fear of cancer introduce a high emotional issue (as the Court of Appeals readily acknowledged), it is essential that juries hearing such claims be properly instructed.

The magnitude of this issue is further heightened for railroads because they can potentially be liable for all damages suffered by plaintiffs with asbestos-related, or other types of, injuries, even when railroad employment caused a minimal amount of the harm suffered. In *Ayers*, this Court held that FELA's joint and several liability scheme prohibited apportionment of damages among joint tortfeasors. As a result, if any exposure to a harmful substance occurred during the plaintiff's railroad employment, the railroad can be held liable for the full extent of

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roads, by and on behalf of locomotive engineers and conductors alleging injury due to exposure to diesel exhaust. Among other things, the complaints allege that the plaintiffs suffer from fear of cancer. *See Taylor v. CSX Transp., Inc.*, 2007 WL 2891085 (N.D. Ohio 2007)(denying class certification).

the damages even if the majority of the harmful exposure can be attributed to other employment.[11] The effect of this rule is underscored by the fact that one of the *Ayers* plaintiffs was "exposed to asbestos [at the railroad] for only three months" and "worked with asbestos elsewhere as a pipefitter for 33 years." 538 U.S. at 143. Two of the other *Ayers* plaintiffs "had significant exposure to asbestos while working for other [non-railroad] employers." *Id.* Thus, railroads can be fully liable for all asbestos-related damages, including fear of cancer, not just to long-term employees, but also to former employees whose rail employment was fleeting.

C. Guidance From This Court Will Assure That Lower Courts Undertake Their Proper Gatekeeping Function and Avoid Non-Uniform Application of FELA

If this Court demurs from providing guidance on this issue, confusion and lack of uniformity will continue whenever courts are confronted with fear of cancer claims in FELA cases. As petitioner points out, lower courts have already begun to take divergent approaches with respect to fear of cancer claims. Petition at 24-26. This divergence of approaches likely will lead to a lack of uniformity in the interpretation of FELA and, inevitably, forum

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[11] The Court recognized that railroads could pursue contribution and indemnity claims, as permitted under state law. 538 U.S. at 162. Often, however, this remedy is illusory, as many joint tortfeasors who are responsible for a plaintiff's harmful exposure to asbestos are out of business. By mid-2004, over 70 asbestos defendants have dissolved or filed for bankruptcy protection. RAND at 109.

shopping, a practice facilitated by FELA's broad venue provisions.

FELA plaintiffs are provided with many options when choosing where to bring and maintain their lawsuit. A FELA suit may be brought in either state or federal court in any district in which the railroad does business, 45 U.S.C. §56; and, if a case is brought in state court, it may not be removed to federal court. 28 U.S.C. §1445(a). The four largest railroads in the United States each operate in over than 20 states, and as a result will face asbestos suits over a wide geographical area. Moreover, historically, courts have permitted plaintiffs wide latitude over selection of venue: naturally, plaintiffs often select a venue based on their perception of where courts are likely to interpret the law to their advantage. The FELA's venue provision gives plaintiffs "the right to select the court in which he considers it would be most advantageous for him to bring his action." *Petersen v. Ogden Union Ry. & Depot Co.*, 175 P.2d 744, 747 (Utah 1946). For example, the Montana Supreme Court does not recognize the doctrine of *forum non conveniens* in FELA cases, in part, in reliance on FELA's "policy favoring the injured worker's choice of forum [citations omitted] even if that choice of forum involves forum shopping." *State ex rel. Burlington Northern R.R. Co. v. District* Court, 891 P.2d 493, 499 (Mont. 1995).[12] Though FELA is to be interpreted uniformly, *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371 (1953); *New York Cent. R.R. v. Winfield*, 244

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[12] The Court held that "a district court in this state may not dismiss a FELA action because it deems itself to be an inconvenient forum" and "that a district court in this state is not empowered to change the place of trial of a FELA action based on the doctrine of *forum non conveniens*." *Id.*

U.S. 147, 150 (1917), plaintiffs who intend to allege fear of cancer no doubt will select a forum in which they can count on the court to decline to instruct the jury on a plaintiff's evidentiary obligation in such cases[13]

Trial courts have an obligation to fulfill and take seriously their gatekeeping role in fear of cancer cases as required by *Ayers*, and to do so in a consistent and uniform manner. Though this Court held that "it is incumbent upon [a plaintiff seeking fear of cancer damages] to prove that his alleged fear is genuine and serious," *Ayers*, 538 U.S. at 157, without further guidance lower courts are likely to continue to address the issue presented here in a disparate manner. Moreover, plaintiffs in FELA asbestos and other exposure cases are likely to seek out courts which, like the court below, will eschew their responsibility to remain faithful to the *Ayers* requirement that only plaintiffs with genuine and serious fear may qualify for fear of cancer damages. The outcome will be "uncabined" liability for fear of cancer damages—a clear departure from the holdings of *Gottshall*, *Buckley* and *Ayers*. This result will be avoided if this Court grants the petition and confirms that in FELA cases where the plaintiff seeks damages for fear of cancer the trial court is required to instruct the jury that the plaintiff must prove that his fear is "genuine and serious."

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[13] Asbestos litigation has long been characterized by efforts of plaintiffs to seek favorable jurisdictions. RAND at 61-63.

CONCLUSION

For the reasons set forth herein, this Court should grant the petition.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505

Counsel for Amicus

* Counsel of Record

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MOTION

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William K. Suter,
Clerk

No. 08-1034

IN THE SUPREME COURT OF THE UNITED STATES

CSX TRANSPORTATION, INC.,
Petitioner,

v.

THURSTON HENSLEY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

MOTION FOR LEAVE TO FILE BRIEF AND *AMICI CURIAE* BRIEF OF AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, COALITION FOR LITIGATION JUSTICE, INC., AMERICAN PETROLEUM INSTITUTE, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONER

Mark A. Behrens*
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005
(202) 783-8400
Attorneys for Amici Curiae
* *Counsel of Record*

Additional Counsel Listed on Inside Cover

Of Counsel

H. Sherman Joyce
AMERICAN TORT
REFORM ASSOCIATION
1101 Connecticut Ave, NW
Suite 400
Washington, DC 20036
(202) 682-1163

Quentin Riegel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave., NW
Sixth Floor
Washington, DC 20004
(202) 637-3058

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Donald D. Evans
AMERICAN CHEMISTRY
COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Karen R. Harned
Elizabeth A. Milito
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F Street, NW
Suite 200
Washington, DC 20004
(202) 314-2061

Harry M. Ng
Erik G. Milito
AMERICAN PETROLEUM
INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

Lynda S. Mounts
AMERICAN INSURANCE
ASSOCIATION
2101 L Street, NW,
Suite 400
Washington DC 20037
(202) 828-7158

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY
INSURERS ASSOCIATION
OF AMERICA
2600 South River Road
Des Plaines, IL 60018
(847) 553-3826

No. 08-1034

IN THE
SUPREME COURT OF THE UNITED STATES

CSX TRANSPORTATION, INC.,
Petitioner,

v.

THURSTON HENSLEY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37, *amici curiae* request leave to file the accompanying brief in support of the above-referenced Petition for a Writ of Certiorari.[1]

As associations that represent asbestos defendants, and their insurers, *amici* have a substantial interest in ensuring that asbestos liability rules are fair, predictable, and promote sound public policy. The Tennessee appellate court's decision below violates these fundamental principles and upsets the careful balance this Court struck in *Norfolk & W.*

[1] Respondents' counsel did not consent to the filing of *amici's* brief in this action. Counsel of record for all parties received notice of *amici*'s intention to file the accompanying brief at least ten days prior to the brief's due date.

Ry. Co., v. Ayers, 538 U.S. 135 (2003), where the Court held that, under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, a plaintiff suffering from asbestosis (a potentially impairing scarring of the lungs) may "seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages" *if* the plaintiff "prove[s] that his alleged fear is genuine and serious." 538 U.S. at 157.

The *Ayers* Court's requirement that the plaintiff's fear of developing cancer in the future must be "genuine and serious" was an "important" limitation, *id.*; it tries to prevent a "flood of less important cases," *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997) (rejecting medical monitoring under FELA absent a present, physical injury), that could swamp the courts, delay recoveries for claimants with serious conditions, bankrupt defendants, and jeopardize recoveries for cancer victims. The standard also helps to reduce the possibility of fraudulent claims. *Cf. Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994).

To further minimize the risk of "unlimited and unpredictable liability" in asbestos cases, *id.* at 433, this Court in *Ayers* identified a number of "verdict control devices," including, "on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious." 538 U.S. at 159 n.19.

The decision below, which holds that a defendant has no right to a "genuine and serious fear" jury instruction, is not only inconsistent with this Court's holding in *Ayers*, but also ignores the important

policy concerns which guided this Court's decisions in *Metro-North* and *Ayers*.

Amici are well-suited to provide a broad perspective to this Court on the troubling implications of allowing the decision below to stand. The proposed brief does not seek to simply repeat the Petitioner's arguments. Rather, the brief discusses the importance of the Petition in the context of the overall asbestos litigation environment, including the recent progress that has been by courts and state legislatures to address and improve the "asbestos-litigation crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

Decisions such as the lower court's opinion represent an unsound return to the types of rules and practices that have already bankrupted at least eighty-five employers, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, and threaten the ability of the seriously ill to receive adequate or timely compensation. Although the instant case is limited to FELA actions, how this Court chooses to handle the case will impact asbestos litigation more generally. A message from this Court would provide powerful guidance to courts hearing asbestos actions under state common law and could lead others to join the growing list of jurisdictions that are acting to restore rationality and fairness to the asbestos litigation within their borders. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 Conn. Ins. L.J. 477 (2006).

* * *

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect

the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. NFIB members own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insur-

ance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers in 2000 to address and improve the mass tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[2] The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the mass tort litigation environment.

The American Petroleum Institute ("API") is a nationwide, non-profit, trade association headquartered in Washington, D.C., that represents over 400 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, transportation, refining and marketing.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry

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[1] The Coalition for Litigation Justice includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company; CNA service mark companies; Fireman's Fund Insurance Company; Liberty Mutual Insurance Group; and the Great American Insurance Company.

companies invest more in research and development than any other business sector.

* * *

Accordingly, a*mici* ask the Court to grant their Motion.

Respectfully submitted,

Mark A. Behrens*
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005
(202) 783-8400

Attorneys for Amici Curiae
* *Counsel of Record*

H. Sherman Joyce
AMERICAN TORT
REFORM ASSOCIATION
1101 Connecticut Ave, NW
Suite 400
Washington, DC 20036
(202) 682-1163

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Quentin Riegel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3058

Karen R. Harned
Elizabeth A. Milito
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061

Lynda S. Mounts
AMERICAN INSURANCE
ASSOCIATION
2101 L Street, NW, Suite 400
Washington D.C. 20037
(202) 828-7158

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018
(847) 553-3826

Harry M. Ng
Erik G. Milito
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Of Counsel

Dated: March 16, 2009

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521 U.S. 591 (1997)..... *passim*

Borel v. Fibreboard Paper Prods. Corp.,
493 F.2d 1076 (5th Cir. 1973) 7

Cimino v. Raymark Indus., Inc.,
151 F.3d 297 (5th Cir. 1998) 12-13

Consol. Rail Corp. v. Gottshall,
512 U.S. 532 (1994)..... 5, 18

Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co., 718 F. Supp. 1053
(D. Mass. 1989) 9

Eagle-Picher Indus., Inc. v. Cox, 481 So.2d
517 (Fla. Dist. Ct. App. 1985)..... 20

In re Combustion Eng'g, Inc., 391 F.3d 190
(3d Cir. 2005) 2, 10

In re Joint E. & S. Dists. Asbestos Litig.,
129 B.R. 710 (E.D.N.Y. & S.D.N.Y. 1991),
vacated, 982 F.2d 721 (2d Cir. 1992),
opinion modified on reh'g, 993 F.2d 7
(2d Cir. 1993) ..... *passim*

Kilpatrick v. Dept. of Labor, 883 P.2d 1370
(1994), *amended*, 915 P.2d 519 (Wash.
1995) 20

In re USG Corp., 290 B.R. 223 (Bankr. D. Del. 2003) 16

Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997) ..... *passim*

Norfolk & W. Ry. Co., v. Ayers, 538 U.S. 135 (2003) ..... *passim*

Owens Corning v. Credit Suisse First Boston, 322 B.R. 719 (D. Del. 2005) 9

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) ..... *passim*

STATUTES AND REGULATIONS

36 Fed. Reg. 10466, 10506 (May 29, 1971) 7

36 Fed. Reg. 23207 (Dec. 7, 1971) 7

37 Fed. Reg. 11318 (June 7, 1972) 7

45 U.S.C. §§ 51-60 2

Fla. Stat. §§ 774.201–.209 15

Ga. Code Ann. §§ 51-14-1–13 15

Kan. Stat. Ann. §§ 60-4901—4911 15

Ohio Rev. Code Ann. §§ 2307.91–.96 15

S.C. Code Ann. §§ 44-135-30–110 15

Tex. Civ. Prac. & Rem. Code Ann.
§§ 90.001–.012 15

OTHER AUTHORITIES

American Academy of Actuaries, *Current Issues in Asbestos Litigation* (Feb. 2006), at http://www.actuary.org/pdf/casualty/asbestos_feb06.pdf. 3

Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002).... 5

Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 Conn. Ins. L.J. 477 (2006) 6

Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 Rev. Litig. 253 (2005)... 16

Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1 (2003) 9

Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1 4

Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33 (2003)..... 9

Stephen J. Carroll *et al.*, *Asbestos Litigation* (RAND Inst. for Civil Justice 2005) ..... *passim*

A. Churg & F. Green, *Pathology of Occupational Lung Disease* (2d ed. 1998) .. 19-20

Congress of the United States, Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* (Oct. 2003) 11

R. Doll & J. Peto, *Effects on Health of Exposure to Asbestos* (1985) 20

Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14 11

Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383 (1993) 10

The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary, 106th Cong., (July 1, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law School) 8

The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the H. Comm. on the Judiciary, 106th Cong. (July 1, 1999) (statement of Prof. William Eskridge, Yale Law School) 13-14

Alison Frankel, *Asbestos Removal*, Am. Law., July 2006, at 15 ..... 17, 18

Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511 (2008)..... *passim*

Peter Geier, *States Taking up Medical Criteria: Move is to Control Asbestos Caseload*, Nat'l L.J., May 22, 2006 17

Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121 (2005)..... 11

James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 3:6 Mealey's Tort Reform Update 12 (Jan. 18, 2006)..... 14

James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815 (2002) 4

Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin's Columns – Raising The Bar In Asbestos Litig., Aug. 2004, at 5..... 12

Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 Rev. Litig. 883 (2007) 8

Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 5 (Mar. 1991) 3

Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6 11

Matthew Mall, Note, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Litigation*, 48 Wm. & Mary L. Rev. 2043 (2007) 15

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595 (1997) 14

'Medical Monitoring and Asbestos Litigation'– A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) 11-12

Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26 10

Christopher J. O'Malley, Note, *Breaking Asbestos Litigation's Chokehold on the American Judiciary*, 2008 U. Ill. L. Rev. 1101 (2008) 4

Roger Parloff, *Welcome to the New Asbestos Scandal*, Fortune, Sept. 6, 2004, at 186 4

Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001)..... 2

Joseph Sanders, *Medical Criteria Acts: State Statutory Attempts to Control the Asbestos Litigation*, 37 Sw. U. L. Rev. 671 (2008).... 15

Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541 (1992)..... 16

Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247 (2000)..... 4

James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223 (2006) ... 11

Patti Waldmeir, *Asbestos Litigation Declines in Face of US Legal Reforms*, Fin. Times (London), July 24, 2006, at 2..... 17

Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1 9

Susan Warren, *Swamped Courts Practice Plaintiff Triage*, Wall St. J., Jan. 27, 2003, at B1 16

Philip Zimmerly, Comment, *The Answer is Blowing in Procedure: States Turn to Medical Criteria and Inactive Dockets to Better Facilitate Asbestos Litigation*, 59 Ala. L. Rev. 771 (2008) 10

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AMICI CURIAE BRIEF OF AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, COALITION FOR LITIGATION JUSTICE, INC., AMERICAN PETROLEUM INSTITUTE, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

[1] In accordance with Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

Amici curiae are associations whose members include asbestos litigation defendants and their insurers. Consequently, *amici* have a substantial interest in ensuring that asbestos liability rules are fair, predictable, and promote sound public policy.

As explained below, the Tennessee appellate court's decision violates these fundamental principles, is flatly inconsistent with this Court's holding in *Norfolk & W. Ry. Co., v. Ayers*, 538 U.S. 135 (2003), and upsets the careful balance this Court struck in *Ayers*. There, the Court held that, under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, a plaintiff suffering from asbestosis (a potentially impairing scarring of the lungs) may "seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages" *if* the plaintiff "prove[s] that his alleged fear is genuine and serious." 538 U.S. at 157. If allowed to stand, the lower court's decision could invite a flood of trivial or fraudulent claims, adversely affecting *amici*'s members.

STATEMENT OF THE CASE

Amici adopt Petitioner's statement of the case.

SUMMARY OF ARGUMENT

"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005).[2] As far back as 1991, the Federal Judicial Conference Ad Hoc Committee on Asbestos Litigation found:

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[2] *See also* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

> [D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States* 2-3 (Mar. 1991), *reprinted at* 6:4 Mealey's Litig. Rep.: Asbestos 2 (Mar. 15, 1991). In 1997, this Court described the asbestos litigation as a "crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). More recently, the Court has noted the extraordinary problems created by the "elephantine mass" of asbestos cases. *Ayers*, 538 U.S. at 166 (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)).

Through 2002, approximately 730,000 asbestos claims had been filed. *See* Stephen J. Carroll *et al.*, *Asbestos Litigation xxiv* (RAND Inst. for Civil Justice 2005).[3] At least 322,000 asbestos claims may be pending. *See* American Academy of Actuaries, *Current Issues in Asbestos Litigation* (Feb. 2006).

Initially, lower courts, acting with the best of intentions but lacking sufficient foresight, sought to address the influx of asbestos claims by streamlining

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[3] RAND has estimated that $70 billion was spent in the litigation through 2002; future costs could reach $195 billion. *See id.* at 92, 106.

procedures and lowering barriers to recoveries. Rather than make the litigation go away, however, these practices simply invited more filings. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247 (2000).

In particular, the courts became flooded with hundreds of thousands of cases involving claimants with little or no physical impairment. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 823 (2002) ("By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic.").[4] Mass filings by unimpaired claimants created judicial backlogs, contributed to scores of defendants being forced into bankruptcy, and threatened the ability of the seriously ill to receive adequate or timely compensation. *See*

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[4] *See also* Christopher J. O'Malley, Note, *Breaking Asbestos Litigation's Chokehold on the American Judiciary*, 2008 U. Ill. L. Rev. 1101, 1105 (2008) ("Most individuals with pleural plaques experience no lung impairment, no restrictions on movement, and usually do not experience any symptoms at all."); Roger Parloff, *Welcome to the New Asbestos Scandal*, Fortune, Sept. 6, 2004, at 186 ("According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are 'unimpaireds'—that is, they have slight or no physical symptoms."); Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1 ("Very few new plaintiffs have serious injuries, even their lawyers acknowledge . . . . 'The overwhelming majority of these cases . . . are brought by people who have no impairment whatsoever.'").

Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002).

This Court was one of the first to appreciate the serious problems posed by the asbestos litigation and the careful balance that must be struck to: (1) avoid subjecting defendants to "unlimited and unpredictable liability," *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 433 (1997), (2) prevent a "flood of less important cases," *id.* at 442, from draining the pool of resources available for meritorious claims brought by plaintiffs with serious injury; and (3) reduce the possibility of fraudulent claims. *Cf. Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994).

In *Metro-North* (1997), the Court ruled against allowing negligent infliction of emotional distress or medical monitoring claims brought by an asymptomatic pipefitter against his employer for occupational exposure to asbestos under FELA. *See id.* at 427.

The Court addressed FELA asbestos issues once again in *Ayers* (2003). There, the Court held that, under FELA, a plaintiff suffering from asbestosis may "seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages" *if* the plaintiff "prove[s] that his alleged fear is genuine and serious." 538 U.S. at 157. By requiring the fear of cancer to be "genuine and serious," the Court was trying to prevent the policy concerns raised in *Metro-North* from occurring in FELA asbestosis/fear of cancer cases. To further minimize this risk, the Court in *Ayers* also identified

a number of "verdict control devices," including, "on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious." 538 U.S. at 159 n.19. This instruction was refused by the court below.

The "genuine and serious" fear requirement in *Ayers* must be enforced to prevent a "flood of less important cases," *Metro-North*, 521 U.S. at 442, with potentially "unlimited and unpredictable liability," *id.* at 433, in cases arising under FELA (or other FELA-like federal statutes), and the potential for fraudulent claims.

The lower court's decision signals a troubling return to the types of unsound asbestos rules and practices which led to the situation this Court described in 1997 as the "asbestos-litigation crisis." *Amchem Prods., Inc.*, 521 U.S. at 597. The decision sends the wrong message at a time when other jurisdictions are making strides to improve the overall asbestos litigation environment. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 Conn. Ins. L.J. 477 (2006).

Within this context, the instant case provides a pivotal opportunity for this Court to continue its leadership in guiding courts struggling with asbestos litigation, and to ensure that courts faithfully adhere to the standards this Court sets forth. While the case is limited to FELA actions, how this Court chooses to handle the case will impact asbestos litigation more generally. A message from this Court would provide powerful guidance to courts hearing asbestos actions under state common law and could lead others to join the growing list of jurisdictions

that are acting to restore rationality and fairness to the asbestos litigation within their borders.

For these reasons, *amici* urge this Court to grant the Petition for Writ of Certiorari in this action and reverse the judgment below.

ARGUMENT

I. THE PETITION SHOULD BE VIEWED IN THE CONTEXT OF THE BROADER ASBESTOS LITIGATION ENVIRONMENT

A. The Current Litigation Environment

When asbestos product liability lawsuits emerged almost forty years ago,[5] nobody could have predicted that courts today would still be dealing with the "longest-running mass tort" in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008). The Occupational Safety and Health Administration ("OSHA") promulgated its first asbestos regulation in 1971, and followed up with increasingly stringent regulations in the years to follow.[6] By the early 1970s, "use of new asbestos essentially ceased in the United States." *In re Joint E. & S. Dists. Asbestos Litig.*,

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[5] *See Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (asbestos product manufacturers could be held strictly liable for failure to warn of asbestos exposure risks).

[6] OSHA was created in 1970 and almost immediately promulgated an initial regulation limiting exposure to asbestos. *See* 36 Fed. Reg. 10466, 10506 (table G-3) (May 29, 1971). Soon thereafter, OSHA revised its regulations to limit exposure still further and to require special handling of asbestos products. *See* 36 Fed. Reg. 23207 (Dec. 7, 1971); 37 Fed. Reg. 11318 (June 7, 1972). OSHA's asbestos regulations became progressively more restrictive until they effectively precluded the use of asbestos in most commercial applications.

129 B.R. 710, 737 (E.D.N.Y. & S.D.N.Y. 1991) (Weinstein, J.), *vacated*, 982 F.2d 721 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) (reviewing history of asbestos use). Therefore, many believed that asbestos litigation would be a serious but diminishing problem.

The opposite was true. Instead of declining, asbestos filings multiplied exponentially. In 1991, approximately 100,000 asbestos cases were pending in courts around the country. By 1999, that number had doubled to roughly 200,000. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at 5 (July 1, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law School). That momentum continued into the 2000s, with approximately 730,000 asbestos claims filed through 2002 alone. *See* Carroll, *supra*, at *xxiv*.

Only in the past few years have courts and state legislatures, through a variety of methods, been able to stem the rapid proliferation of asbestos cases. *See* Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 Rev. Litig. 883 (2007) (explaining the current status and history of mass toxic tort litigation and the changing dynamics resulting from executive, legislative, and judicial policy efforts).

1. Filings by the Non-Sick

Until recently, a substantial majority of claims were brought on behalf of unimpaired claimants diagnosed largely through plaintiff-lawyer-arranged

mass screenings.[7] It is estimated that over one million workers have undergone attorney-sponsored screenings. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33, 68 (2003); *see also* Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003) (stating that mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs.").

The problem, as policy-makers, judges, and lawyers for the truly sick recognized, was that mass filings by unimpaired claimants were creating judicial backlogs and exhausting defendants' resources. *See* Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1 (discussing the wave of corporate bankruptcies resulting from asbestos litigation).

These dynamics were not lost on this Court. *See Amchem Prods., Inc.*, 521 U.S. at 598 ("exhaustion of assets threatens and distorts the process; and future claimants may lose altogether); *Ayers*, 538 U.S. at 169 ("It is only a matter of time before inability to pay for real illness comes to pass.") (Kennedy, J., dissenting in relevant part).

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[7] *See Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms."); *Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed.").

As explained further below, a number of reforms recently adopted by state legislatures and courts have had a major impact on filings by the non-sick. *See, e.g.*, Freedman, *supra*, at 513 ("Perhaps the most dramatic change since the dawn of the new century has been the restriction of the litigation to the functionally impaired."); *see also* Philip Zimmerly, Comment, *The Answer is Blowing in Procedure: States Turn to Medical Criteria and Inactive Dockets to Better Facilitate Asbestos Litigation*, 59 Ala. L. Rev. 771 (2008).

2. Bankruptcies and the Economic Impact of the Litigation

"For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy," *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2005), including an estimated eighty-five employers. *See* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29; *see also* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993) (each time a defendant declares bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited"); *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 751 ("Overhanging this massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims.").

This combination of bankruptcies and incredible litigation expenditures has depleted the pool of resources from which the truly sick may recover. For example, the Manville trustees reported that a "dis-

proportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever." Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6. The Trust is now paying out *five cents on the dollar* to asbestos claimants. *See id.* Many other trusts have been forced to cut or delay payments to claimants. *See* James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 262 (2006).

3. Peripheral Defendants Are Being Dragged into the Litigation

As a result of these bankruptcies and depleted resources, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14. The Congressional Budget Office observed that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities." Congress of the United States, Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003); *see also* Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"). One well-known plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig.

Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

More than 8,500 defendants have now become "ensnarled in the litigation." *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 747-48; Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin's Columns – Raising The Bar In Asbestos Litig., Aug. 2004, at 5. Nontraditional defendants now account for more than half of asbestos expenditures. *See* Carroll, *supra*, at 94.

B. The Courts' Contribution to the Crisis

The origins of the wave of asbestos litigation that began in the 1970s are well known. In the 1940s and 1950s, millions of American workers were exposed to asbestos, usually with few or no precautions. Resulting illnesses began to appear by the 1960s, and, because some asbestos-related diseases have latency periods of up to 40 years, injuries continued to emerge in later decades. Absent congressional action – and, despite pleas from this Court, other courts, and the Judicial Conference, none has been forthcoming[8] – it was inevitable that asbestos litigation would present a major problem for the courts.

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[8] *See Ortiz*, 527 U.S. at 821 ("[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."); *id.* at 865 ("'[T]he elephantine mass of asbestos cases' cries out for a legislative solution.") (Rehnquist, C.J., joined by Scalia and Kennedy, J.J., concurring) (internal citation omitted); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 313 (5th Cir. 1998) ("There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.") (internal citation omitted); Judicial Conference Report at 3 ("The Committee firmly believes that the ulti-

What is harder to understand is why a problem that should have begun to resolve itself by now has continued for so long. It is here that the courts themselves share some of the blame. With the best of intentions, many courts adopted both procedural and substantive rules intended to facilitate resolution of asbestos claims – to put money in the hands of the sick as quickly as possible, and also to clear court dockets of overwhelming numbers of cases. Those efforts have been massively counterproductive. Lowering the legal barriers to recovery may seem attractive in individual cases, but in the aggregate, it only fuels the fire, inviting more and more claims with little regard for merit.

One "near-heroic effort[] . . . to make the best of a bad situation," *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring), involved mass settlements of hundreds of thousands or even millions of claims aggregated under Rule 23 of the Federal Rules of Civil Procedure. But that route was invalidated by the Court in *Amchem* and *Ortiz*: even the most pressing efficiency interests, the Court held, cannot justify the lumping together of disparate and fact specific claims for settlement purposes. *See Amchem*, 521 U.S. at 620-29; *Ortiz*, 527 U.S. at 841-61.

Other courts turned to mass joinders and "jumbo" consolidations, aggregating thousands of claims against dozens or hundreds of defendants in an effort to produce quick settlements with low transaction costs. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. At 13

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mate solution should be legislation . . . creating a national asbestos dispute resolution scheme . . . .").

(July 1, 1999) (statement of Prof. William Eskridge, Yale Law School) (describing pressure on defendants to settle on terms favorable to plaintiffs).

As it turns out, bending procedural and substantive rules to put pressure on defendants to settle brings no lasting efficiency gains. This effect should not be surprising:

> Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

C. State Efforts to Manage the Litigation

Recently, and in the wake of this Court's decisions in *Metro-North* and *Ayers*, *see infra*, a number of courts and state legislatures have acted to address these serious problems and improve the asbestos litigation environment in their jurisdictions. *See* James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 3:6 Mealey's Tort Reform Update 12 (Jan. 18, 2006) ("A movement is afoot among state courts and legislatures that may prove to be the beginnings of a reversal in the disheartening trends of recent years, perhaps the turning of a corner in this hugely important and highly controversial area of tort litigation.").

Beginning in 2004, state legislatures in some key jurisdictions began to enact "medical criteria" laws requiring asbestos claimants to present credible and objective medical evidence of physical impairment in order to bring or proceed with a claim.[9] These laws "set forth rigid criteria for the claimant diagnoses." Matthew Mall, Note, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Litigation*, 48 Wm. & Mary L. Rev. 2043, 2060 (2007); *see also* Joseph Sanders, *Medical Criteria Acts: State Statutory Attempts to Control the Asbestos Litigation*, 37 Sw. U. L. Rev. 671, 689 (2008) (concluding that "medical criteria acts are a step in the right direction").

State legislatures have also acted to require individualized trials, removing an economic incentive for plaintiffs to file claims that may have little or no value unless they are joined with other more serious cases. From 2005 through 2007, Texas, Kansas, and Georgia enacted laws that generally preclude the joinder of asbestos cases at trial.[10]

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[9] Medical criteria laws for asbestos cases were enacted in Ohio in 2004, Texas and Florida in 2005, Kansas and South Carolina in 2006, and Georgia in 2007. *See* FLA. STAT. §§ 774.201–.209; GA. CODE ANN. §§ 51-14-1–13 (2000 & Supp. 2008); KAN. STAT. ANN. §§ 60-4901–-4911 (2005 & Supp. 2007); OHIO REV. CODE ANN. §§ 2307.91–.96 (West 2004 & Supp. 2008); S.C. CODE ANN. §§ 44-135-30–110 (2002 & Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001–.012 (Vernon 2005 & Supp. 2008).

[10] *See* GA. CODE ANN. § 51-14-11 (Supp. 2008); KAN. STAT. ANN. § 60-4902(j) (Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 90.009 (Vernon Supp. 2008).

Courts also have helped to curb filings by the non-sick. For instance, a growing number of courts have implemented inactive asbestos dockets (also called deferred dockets or pleural registries) to give trial priority to the sick. *See* Susan Warren, *Swamped Courts Practice Plaintiff Triage*, Wall St. J., Jan. 27, 2003, at B1.[11] Under these docket management plans, the claims of the non-sick are suspended and preserved; they also are exempt from discovery. Claimants may petition for removal to the trial docket when credible medical evidence of impairment is shown. *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541 (1992).

The result of the above-described developments has been a dramatic reduction in the number of filings by unimpaired claimants. For example, Richard

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[11] Since 2002, the list of jurisdictions with inactive asbestos dockets has grown to include: Cleveland, Ohio (Mar. 2006); Minnesota (June 2005) (coordinated litigation); St. Clair County, Illinois (Feb. 2005); Portsmouth, Virginia (Aug. 2004) (applicable to cases filed by the Law Offices of Peter T. Nicholl); Madison County, Illinois (Jan. 2004); Syracuse, New York (Jan. 2003); New York City, New York (Dec. 2002); and Seattle, Washington (Dec. 2002). Earlier courts that had adopted inactive dockets include Baltimore City, Maryland (Dec. 1992); Cook County (Chicago), Illinois (Mar. 1991); and Massachusetts (coordinated litigation) (Sept. 1986). In 2005, the RAND Institute for Civil Justice called the "reemergence" of inactive dockets one of "the most significant developments" in asbestos litigation. *See* Carrroll, *supra*, at xx (2005); *see also In re USG Corp.*, 290 B.R. 223, 226 n.3 (Bankr. D. Del. 2003) ("The practical benefits of dealing with the sickest claimants . . . have led to the adoption of deferred claims registries in many jurisdictions."); Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 Rev. Litig. 253, 264 (2005).

Schuster, chairman of the Columbus-based Vorys, Sater, Seymour and Pease's national toxic tort defense litigation practice, has said that Ohio's medical criteria law "dramatically cut the number of new case filings by more than 90%." Peter Geier, *States Taking Up Medical Criteria: Move Is to Control Asbestos Caseload*, Nat'l L.J., May 22, 2006, at 1. Bryan Blevins of Provost & Umphrey, a national plaintiffs' practice based in Beaumont, Texas, has said that since Texas enacted its asbestos medical criteria law, "[t]he only cases getting filed now are cancer cases." *Id.* John Cooney, an asbestos plaintiffs' lawyer based in Chicago, has said, "I know whole firms that just don't do asbestos anymore." Patti Waldmeir, *Asbestos Litigation Declines in Face of US Legal Reforms*, Fin. Times (London), July 24, 2006, at 2 New York Appellate Division Justice Helen Freedman, who adopted a Deferred Docket when she managed the New York City asbestos litigation as a trial court judge, has said that "[a] preliminary estimate indicates that the Deferred Docket reduced the number of cases actually pending in my court by 80 percent." Freedman, *supra*, at 514.

"A lot of companies that were seeing 40,000 cases in 2002 and 2003 have dropped to the 15,000 level," according to Jennifer Biggs, who chairs the mass torts subcommittee of the American Academy of Actuaries. Alison Frankel, *Asbestos Removal*, Am. Law., July 2006, at 15. Frederick Dunbar, a senior vice president of NERA Economic Consulting, recently studied the Securities and Exchange Commission filings of eighteen large asbestos defendants and found that, "for all of them, 2004 asbestos claims had dropped from peak levels of the previous three years.

Ten companies saw claims fall by more than half between 2003 and 2004." *Id.*

II. THIS COURT SHOULD GRANT CERTIORARI TO HELP ENSURE MORE TIMELY AND ADEQUATE RECOVERIES FOR PERSONS WITH SERIOUS INJURIES AND TO PROTECT DEFENDANTS FROM TRIVIAL OR FRAUDULENT CLAIMS

A. The Safeguards Articulated by This Court Should be Enforced

The significant progress made in curtailing filings by the unimpaired and prioritizing resources for the truly sick is, in part, a result of this Court's past asbestos case guidance. This case represents an important opportunity to reaffirm the Court's commitment to the sound public policy protecting resources for seriously injured claimants, and to ensure that the standards the Court sets forth in this regard are not diluted or eviscerated by inconsistent lower court interpretations.

Over a decade ago, this Court in *Metro-North* refused to authorize an asbestos-related medical monitoring claim under FELA, recognizing that such a claim would extend to "tens of millions of individuals," expose defendants to unlimited liability, and thus drain the pool of resources available for meritorious claims by plaintiffs with serious present harm. 521 U.S. at 442; *see also Gottshall*, 512 U.S. at 546 (cautioning against the "very real possibility of nearly infinite and unpredictable liability for defendants" in FELA case deciding whether to allow claims for negligently inflicted emotional distress).

The Court applied this same public policy rationale in *Ayers*. The case was a 5-4 decision, with two dissenting opinions, both of which expressed serious concern for "unlimited and unpredictable liability" by allowing asbestosis plaintiffs to be compensated for fear of cancer as part of their damages for pain and suffering. 538 U.S. at 181 (Kennedy, J., dissenting in relevant part) (quoting *Metro-North*, 521 U.S. at 433); *id.* at 185 (Breyer, J., dissenting in relevant part) (same). The dissents pointed to the depleted pool of assets occasioned by asbestos bankruptcies, warning that permitting such broad liability for fear of cancer would more quickly exhaust the funds available to those who actually have or will develop cancer. *Id.* at 167-170 (Kennedy, J., dissenting); *id.* at 185-187 (Breyer, J. dissenting).

To safeguard recovery for the truly sick while permitting recovery for *certain* fears of cancer, *Ayers* struck a careful balance. The Court, responding to the arguments of the four dissenting justices, stated an important limitation that the fear of cancer must be "genuine and serious" to allow recovery. *Id.* at 159 n.19. The Court explained that this was a "verdict control device" meant to preserve resources from "bankrupt defendants." *Id.* At the same time, the limitation ensured that determinations of liability were not "entirely outside the jury's ken." *Id.*

The decision below fundamentally distorts the balance struck in *Ayers*[12] and the clear public policy

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[12] Also incorporated within this balance is recognition that asbestosis is a distinct disease from cancer, and that the generally-accepted medical view is that asbestosis is not causally related to cancer and does not itself develop into cancer. *See, e.g.*, A. Churg & F. Green, *Pathology of Occupational Lung Disease*

objectives underlying both *Ayers* and *Metro-North*. In refusing to instruct the jury on the "genuine and serious" limitation and allowing the claim for fear of cancer based on the respondent's own testimony that he had a "concern" or "anxiety" about the possibility of contracting disease in the future, the substance of such a protection is rendered meaningless.

This Court should grant certiorari not only to send a clear message that other courts may not nullify the careful standards articulated by this Court, but also to continue to guide courts in advancing the public policy protecting and prioritizing the claims of the persons with serious injury.

B. Permitting the Decision Below to Stand Would Result in a Step Backwards With Respect to Controlling Asbestos Lawsuits

In the wake of this Court's rulings in *Metro-North* and *Ayers*, and the meaningful reforms that have taken shape as a result of the work of both courts and legislatures, the lower court's decision here is particularly troubling. Allowing the decision to stand would undermine the significant progress that has been made in the litigation and re-open some of the floodgates.

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312 (2d ed. 1998) (describing asbestos-related diseases as a "disparate set of diseases with different epidemiological, pathogenic, pathologic, and prognostic features"); R. Doll & J. Peto, *Effects on Health of Exposure to Asbestos* 2 (1985); *see also Kilpatrick v. Dept. of Labor*, 883 P.2d 1370, 1375 (1994), *amended*, 915 P.2d 519 (Wash. 1995); *Eagle-Picher Indus., Inc. v. Cox*, 481 So.2d 517, 522 n.7 (Fla. Dist. Ct. App. 1985) ("asbestosis and cancer can be. . . . considered distinct sibling diseases parented by the same cause").

As a light at the end of the tunnel begins to take shape, the decision below functions to allow pain and suffering damages for fear of cancer based on weak and easily contrived evidence of such fear. It permits exactly the type of unwarranted claims this Court has acted against.

If the evolution of asbestos litigation provides any guide, plaintiffs' attorneys will exploit this opening and fear of cancer recoveries will become far more readily available than *Ayers* either contemplates or permits. This will likely also lead to great confusion and division among courts in applying *Ayers*.

CONCLUSION

For these reasons, *amici* urge this Court to grant the Petition for Writ of Certiorari in this action and reverse the judgment below.

Respectfully submitted,

Mark A. Behrens*
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005
(202) 783-8400

Attorneys for Amici Curiae
* *Counsel of Record*

H. Sherman Joyce
AMERICAN TORT
REFORM ASSOCIATION
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036
(202) 682-1163

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Quentin Riegel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3058

Karen R. Harned
Elizabeth A. Milito
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061

Lynda S. Mounts
AMERICAN INSURANCE
ASSOCIATION
2101 L Street, NW, Suite 400
Washington D.C. 20037
(202) 828-7158

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018
(847) 553-3826

Harry M. Ng
Erik G. Milito
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Of Counsel

Dated: March 16, 2009

REPLY BRIEF

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In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

THURSTON HENSLEY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

REPLY BRIEF FOR PETITIONER

GARETH S. ADEN
CHRISTOPHER W. CARDWELL
Gullett, Sanford, Robinson & Martin, PLLC
315 Deaderick Street
Nashville, TN 37219
(615) 244-4994

EVAN M. TAGER
DAN HIMMELFARB
Counsel of Record
STEPHEN E. SACHS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner
[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RANDALL A. JORDAN
GRANT BUCKLEY
KAREN JENKINS YOUNG
CHRISTOPHER R. JORDAN
JANNA BLASINGAME CUSTER
The Jordan Firm
1804 Frederica Road
St. Simons Island, GA
31522
(912) 638-0505

H. DEAN CLEMENTS
Spears, Moore, Rebman
& Williams
801 Broad Street
Chatanooga, TN 37402
(423) 756-7000

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REPLY BRIEF FOR PETITIONER

As the petition demonstrates, this Court should grant certiorari, and either set the case for plenary review or summarily reverse, because (a) the decision below squarely conflicts with *Norfolk & Western Railway Co.* v. *Ayers*, 538 U.S. 135 (2003); (b) the reasoning employed in the decision is severely flawed; (c) the question presented is a recurring one of exceptional importance; and (d) this case is an ideal vehicle for deciding it. The need for review is confirmed by the amicus briefs, filed by a total of eleven organizations, which urge the Court to grant certiorari and reverse the Tennessee Court of Appeals' egregiously mistaken decision. The need for review is further confirmed by respondent's brief in opposition, which provides no serious response to any of petitioner's arguments and offers no persuasive reason why certiorari should be denied.

A. The Decision Below Squarely Conflicts With *Ayers*

Ayers holds that a plaintiff may recover for fear of cancer if, and only if, he "prove[s] that his alleged fear is genuine and serious." 538 U.S. at 157. Consistent with that holding, *Ayers* specifically entitles a defendant, "on [its] request," to "a charge that each plaintiff must prove any alleged fear to be genuine and serious." *Id.* at 159 n.19. The court below nevertheless held that there is no "requirement that the *Ayers* test * * * be communicated to the jury." Pet. App. 34a. As we explain in the petition (at 13-16), its decision is thus flatly inconsistent with *Ayers*.

Respondent makes the remarkable assertion that *Ayers* does *not* hold that a fear of cancer must be "genuine and serious." Opp. 13-14. In support of

that claim, he quotes the following summary of the Court's holding in the introduction to its opinion: "mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos." Opp. 13 (quoting 538 U.S. at 141). But the omission of the "genuine and serious" limitation from that general statement obviously did not nullify in advance what the Court unambiguously said later: that "[i]t is incumbent upon such a complainant * * * to prove that his alleged fear is genuine and serious." 538 U.S. 157. As the court below correctly recognized, *Ayers* "*held* that a complainant with asbestosis can recover damages under FELA for fear of cancer * * * *with th[at] 'important reservation.*'" Pet. App. 33a (emphasis added) (quoting *Ayers*, 538 U.S. at 157).

Respondent also offers an alternative reading of *Ayers*. According to this interpretation—which, like his first one, was not adopted by the court below—a fear of cancer must be "genuine and serious" only if "there has not been 'proof of physical manifestations of the claimed emotional distress'" (something respondent claims is present here). Opp. 14 (quoting *Ayers*, 538 U.S. at 157). This is a slightly narrower theory, but it is equally groundless.

The language from *Ayers* that respondent quotes—the requirement of "physical manifestations"—came from the question presented in the certiorari petition. *Ayers*, 538 U.S. at 157 (quoting 01-963 Pet. Br. i). It reflected the defendant's position, not the Court's. The defendant argued that recovery for fear of cancer should be allowed "only if the claimant proved both a likelihood of developing can-

cer and physical manifestations of the alleged fear." *Id.* at 159. The Court *rejected* that theory, holding, instead, that recovery is permitted if the fear is "genuine and serious." *Id.* at 158-159. "Physical manifestations" may constitute *evidence* that a fear is "genuine and serious," see Pet. App. 71a (proposed instruction), and they may bear upon the amount of *damages* to be awarded if the jury finds a "genuine and serious" fear, see *Ayers*, 538 U.S. at 158 n.17. But *Ayers* unmistakably holds that the relevant question in deciding whether a plaintiff is *legally entitled* to recover is whether the fear is "genuine and serious." That is the question on which, under *Ayers*, a jury must be charged "on a defendant's request," 538 U.S. at 159 n.19, and it is the question on which, under the decision below, a defendant has *no* right to an instruction.

Even if the relevant question *were* whether the fear of cancer either has "physical manifestations" *or* is "genuine and serious," that would mean only that the jury should have been so instructed. It would not mean, as the court below held, and as respondent contends, that there is no need for *any* instruction on the prerequisites to recovery.[1]

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[1] Respondent's assertion (Opp. 14) that the trial court "properly instructed the jury consistent with" *Denton* v. *Southern Railway Co.*, 854 S.W.2d 885 (Tenn. Ct. App. 1993), is a curious one. *Denton* antedated *Ayers* by more than a decade, and it did not address whether a defendant is entitled to a "genuine and serious"—or any other—fear-of-cancer instruction. See *id.* at 887-889.

B. The Reasoning Employed By The Court Below Is Severely Flawed

As we explain in the petition (at 16-19), the court of appeals' reasoning is fundamentally flawed in multiple respects. In particular, (1) the court overlooked the language in *Ayers* making clear that a defendant has a right to a "genuine and serious fear" instruction; (2) the court held that the jury decides whether a fear of cancer is "genuine and serious" but that the jury need not—and apparently *should* not—be told to exercise that responsibility; (3) the court recognized that the emotionally charged issue of cancer can lead jurors to return a verdict based on their passions, but then reached the inexplicable conclusion that that risk makes an instruction unnecessary; and (4) under the court's reasoning, *no one* decides whether there is *in fact* a "genuine and serious" fear of cancer.

Respondent does not engage these arguments; indeed, he offers no real defense of the court of appeals' reasoning. Instead, he merely summarizes the reasoning and then conclusorily asserts that it is correct.

For example, respondent says that the court "correctly held that the purpose of the 'genuine' and 'serious' requirement is to protect defendants from excessive verdicts." Opp. 15. But he does not explain why that purpose makes an instruction on the requirement *less* rather than *more* necessary. Respondent also says that the court of appeals "noted that courts must serve as gatekeepers to ensure that fear-of-cancer claims do not go [to] the jury unless there is credible evidence that the fear is 'genuine and serious.'" *Ibid.* But he does not explain why, when the "gatekeeper" determines that the evidence

is such that the jury could make a finding either way, there is no need to inform the jury that it must decide whether the fear is in fact "genuine and serious."

C. The Question Presented Is A Recurring One Of Exceptional Importance

1. As we explain in the petition (at 19-27), the question presented is one of far-reaching importance. In particular, (1) the court below eliminated a critical mechanism for limiting recoveries in asbestos cases; (2) the need for that mechanism is at least as great today as when *Ayers* was decided; (3) there are hundreds, if not thousands, of pending cases in which the instructional issue could arise; and (4) defendants currently have a right to the instruction in some jurisdictions but not in others.

Respondent does not take issue with any of this. He does not deny that the question presented is a recurring one of exceptional importance; and he offers no direct response to petitioner's arguments on that point.

Respondent does assert that petitioner cannot identify "any court, federal or state," that has required a "genuine and serious fear" instruction. Opp. 16. But of course *this* Court required such an instruction in *Ayers*. That is the central point of the petition. As the petition explains (at 25-26), moreover, there are many States—for example, Illinois, Kansas, Kentucky, Ohio, and Pennsylvania—in which trial judges faithfully apply *Ayers* and give a "genuine and serious" instruction in fear-of-cancer cases.

Respondent also points out that, in light of *Hedgecorth* v. *Union Pacific Railroad Co.*, 210

S.W.3d 220 (Mo. Ct. App. E.D. 2006), cert. denied, 128 S. Ct. 59 (2007), on which the court below relied, trial judges in two States—Missouri and Tennessee—will not give a "genuine and serious fear" instruction. Opp. 16. But the fact that there are now *two* appellate decisions that conflict with *Ayers*—and with the practice in several other States—means only that the conflict among the jurisdictions has grown deeper. It therefore argues *in favor of* certiorari, not against it.[2]

2. The exceptional importance of the question presented is confirmed by the remarkable array of amici—eleven in all—that have filed briefs urging the Court to grant review. They include the world's largest business federation (the Chamber of Commerce of the United States of America); the Nation's largest industrial trade association (the National Association of Manufacturers); the legal arm of the Nation's largest small-business organization (the National Federation of Independent Business); and the association that represents the Nation's major freight railroads and Amtrak (the Association of

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[2] In this context, respondent again suggests that a "genuine and serious" instruction is required only when there is no "physical manifestation" of the fear of cancer. Opp. 16. As we have already explained, the holding of *Ayers* is not so limited. See *supra* pp. 2-3. As far as we are aware, moreover, no lower court on either side of the issue—including the court below—has understood *Ayers* as respondent does. *Jones* v. *CSX Transportation*, 337 F.3d 1316 (11th Cir. 2003) (per curiam), on which respondent relies, assuredly does not. Consistent with *Ayers*, *Jones* held only that "a plaintiff who has asbestosis can recover damages for fear of cancer if the alleged fear is 'genuine and serious,'" and that "a plaintiff [need not] produce evidence of objective manifestations of purported emotional distress." *Id.* at 1317.

American Railroads).[3] Many members of these organizations are directly affected by the "asbestos-litigation crisis." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 597 (1997). The amicus briefs trace the history of that crisis; explain how the rule adopted by the Missouri and Tennessee appellate courts exacerbate it; and demonstrate that the question presented has significance far beyond this case.

It was in response to the concern that broad liability for fear of cancer might "bankrupt defendants," and thereby deplete the funds available to those who actually suffer from the disease, that *Ayers* emphasized the availability of "verdict control devices" in fear-of-cancer cases, including a "genuine and serious fear" instruction. 538 U.S. at 159 n.19. As one group of amici explain, "[t]his case represents an important opportunity to reaffirm the Court's commitment to the sound public policy protecting resources for seriously injured claimants, and to ensure that the standards the Court sets forth in this regard are not diluted or eviscerated by inconsistent lower court interpretations." ATRA Br. 18. As another amicus explains, the issue here "will be faced by state and federal courts throughout the country in virtually every FELA asbestos case." AAR Br. 3.

D. This Case Is An Ideal Vehicle For Deciding the Question Presented

As we explain in the petition (at 27-29), this case is a textbook example of why a "genuine and serious

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[3] The other amici are the American Chemistry Council, the American Insurance Association, the American Petroleum Institute, the American Tort Reform Association, the Coalition for Litigation Justice, Inc., the Property Casualty Insurers Association of America, and the Washington Legal Foundation.

fear" instruction is necessary, and thus an ideal vehicle for confirming that *Ayers* means what it says. In particular, (1) there was only the thinnest evidence that respondent had a "genuine and serious" fear of cancer; (2) respondent's counsel misstated the legal standard in his summation; (3) respondent's summation repeatedly appealed to the jurors' passions; (4) the trial court did not give *any* instruction on fear of cancer; and (5) the damages award—$5,000,000—was enormous.

Respondent does not meaningfully engage these arguments either.[4] Instead, he suggests that this case is not an appropriate vehicle because (1) petitioner's requested instructions were inconsistent with *Ayers* (Opp. 16-19) and (2) other "verdict control devices" were adequate substitutes for a jury charge (Opp. 20-21). These contentions are baseless.

1. *Ayers* held that "the trial judge correctly stated the law when he charged the jury that an asbestosis claimant, upon demonstrating a reasonable fear of cancer stemming from his present disease, could recover for that fear as part of asbestosis-related pain and suffering damages." 538 U.S. at 145. *Ayers* also held that "[i]t is incumbent upon such a complainant * * * to prove that his alleged fear is genuine and serious." *Id.* at 157. Petitioner's proposed instruction No. 30 was consistent with

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[4] Respondent does suggest that there was abundant evidence that he had a "genuine and serious" fear. Opp. 9-12. But he recites only his own testimony concerning his fear of cancer and a doctor's testimony concerning his *risk* of cancer. He identifies no "corroborative objective evidence of his fear." *Ayers*, 538 U.S. at 158 n.18.

Ayers in every particular; indeed, it closely tracked the opinion's language.

The requested charge read as follows:

> Plaintiff is also alleging that he suffers from a compensable fear of cancer. In order to recover, Plaintiff must demonstrate first, that he has a reasonable fear of cancer; second, that reasonable fear stems from Plaintiff's asbestos-related disease; and third, that the reasonable fear is genuine and serious. Plaintiff must prove each of these elements by a preponderance of the evidence.

Pet. App. 70a. Respondent cannot identify a single feature of the proffered instruction that misstates the law. Instead, he claims that the charge "w[as] confusing, used terms not defined, and w[as] duplicative of other items in the jury instruction." Opp. 18. But the instruction speaks for itself. It could not have been clearer; it used plain English that required no further definition; and the fact that it reminded the jury of the standard of proof is hardly objectionable, much less a fatal flaw.

Respondent's similar criticisms of requested instruction No. 33 (Pet. App. 70a-71a) lack merit for similar reasons. The instruction was not remotely "confusing" or "inconsistent." Opp. 18. And it did not "attempt[] to inject [any] qualifiers for recovery" (*ibid.*); the charge merely sought to inform jurors of some considerations they "may take into account" in deciding whether respondent had a "genuine and serious" fear of cancer (Pet. App. 71a). Nor would it have violated *Ayers* to instruct the jury that respondent must have suffered "actual emotional injury." Opp. 19. The trial court itself instructed the jury

that respondent could recover for "emotional suffering" (Pet. App. 62a), and it is surely uncontroversial that such an injury must be an "actual" one. Finally, even if the trial court were not obligated to give instruction No. 33, that would not justify its refusal to give instruction No. 30, a separate charge that was clearly required by *Ayers*.[5]

2. Respondent also faults petitioner for not "request[ing] a special verdict * * * asking the jury to separate any fear-of-cancer damages" and for not "challeng[ing] the verdict amount in the Court of Appeals." Opp. 20. But those litigation decisions have no bearing on petitioner's entitlement to a jury charge.

Ayers identified three "verdict control devices": "[1] on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious, [2] review of the evidence on damages for sufficiency, and [3] particularized verdict forms." 538 U.S. at 159 n.19. Petitioner sought to avail itself of the first two but not the third. *Ayers* obviously does not put a defendant to the choice of seeking either all three or none; the exercise of the right to a jury instruction and sufficiency-of-the-evidence review is not conditioned upon a request for a particularized verdict form. Even if there had been such a request, moreover, the trial court surely would have

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[5] Respondent contends that "[t]he charge given to the jury was an accurate and complete instruction"—and, in particular, that the instruction on pain and suffering was "consistent with the Restatement (Second) of Torts § 456 cited by the Court in *Ayers*." Opp. 16, 18. Unlike *Ayers* itself, however, that Restatement provision does not address recovery for fear of cancer, much less whether any such fear must be "genuine and serious."

denied it, having already refused even to *instruct* the jury on fear of cancer. Indeed, a particularized verdict form would have been pointless without instructions on all the questions the form directed the jury to answer.

Appellate review of the verdict for excessiveness cannot take the place of a properly instructed jury either. *Ayers* holds that a plaintiff cannot recover unless his fear of cancer is "genuine and serious." Because the jury is responsible for deciding whether that requirement has been met, it must be instructed to exercise that responsibility. A properly instructed jury might find that any fear of cancer is *not* "genuine and serious" and therefore award no damages on that claim—particularly in a case, like this, in which the evidence is thin (even if legally sufficient). An after-the-fact challenge to a damages award cannot remedy a failure to instruct, because an appellate court addressing such a challenge will presume that there was in fact a "genuine and serious" fear of cancer that justified some award; the most it will do is reduce the size of the award; and it will not do even that unless, exercising deferential review, it finds the award to be "patently excessive," *Palanki ex rel. Palanki* v. *Vanderbilt Univ.*, 215 S.W.3d 380, 386 (Tenn. Ct. App. 2006), cited in Opp. 21.

In short, there is simply no substitute for the instruction to which a defendant is entitled under *Ayers*. Without it, the "important" limitation on recovery (538 U.S. at 157) is rendered meaningless.

CONCLUSION

The Court should grant the petition and either set the case for plenary review or summarily reverse.

Respectfully submitted.

GARETH S. ADEN
CHRISTOPHER W. CARDWELL
Gullett, Sanford, Robinson & Martin, PLLC
315 Deaderick Street
Nashville, TN 37219
(615) 244-4994

EVAN M. TAGER
DAN HIMMELFARB
Counsel of Record
STEPHEN E. SACHS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

RANDALL A. JORDAN
GRANT BUCKLEY
KAREN JENKINS YOUNG
CHRISTOPHER R. JORDAN
JANNA BLASINGAME CUSTER
The Jordan Firm
1804 Frederica Road
St. Simons Island, GA 31522
(912) 638-0505

H. DEAN CLEMENTS
Spears, Moore, Rebman & Williams
801 Broad Street
Chatanooga, TN 37402
(423) 756-7000

Counsel for Petitioner

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